Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM NOAH, TERRY NOAH, GEORGE GIAKOUMAKIS, MARY LOU GIAKOUMAKIS, CHERYL MONDHEIM, JAMES HOUSE, and PAT HOUSE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In seeking to remedy perceived abuses by some members of an industry, may a legislature retroactively nullify the substantial contractual rights of all members of that industry, without regard to culpability? Specifically, in enacting a law to provide a remedy for insureds who were misled by insurers about the extent of their 1994 Northridge earthquake damages, is it consistent with the Contract Clause of the United States Constitution for the California legislature to deprive all insurers of their contractual right to be free of time-barred claims, without requiring any showing that the insurer engaged in the misconduct the statute is designed to remedy?

PARTIES AND RULE 29.6 STATEMENT

Petitioner Allstate Insurance Company is an Illinois corporation admitted to transact insurance business in California and other states. Allstate Insurance Company is a wholly owned subsidiary of The Allstate Corporation, a publicly traded Delaware corporation. No publicly held company owns 10% or more of The Allstate Corporation's stock.

There are 28 plaintiffs in the proceeding in the court whose judgment is sought to be reviewed. The judgment to be reviewed pertains to only the following seven plaintiffs: William and Terry Noah, George and Mary Lou Giakoumakis, Cheryl Mondheim, and James and Pat House.

The remaining 21 plaintiffs are: Vito Campanelli, Peggy Campanelli, John Caudillo, Barbara Caudillo, Neil Damrow, Gayle Damrow, Nancy Durrant, Garfield Ecung, Debra Ecung, Donald Huner, Tommie Jenkins, Carrie Jenkins, Brenda Kalosh, Donald Menck, Florence Menck, Roy Rosenblatt, Lorraine Rosenblatt, Darla Severn, Loyal Smith, Mildred Stafford, and Marilyn Taber.

Other defendants in the proceeding are Shadowbrook Design Group, Inc., a California Corporation; and W.S.C., a California Corporation (dba Western States Construction, dba Western States Geotechnical, aka Western States Companies).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS THE PETITION SHOULD BE GRANTED	8
I. SUMMARY OF ARGUMENT	8
II. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY IMPOSING COLLECTIVE PUNISHMENT WITHOUT REGARD TO INDIVIDUAL CULPABILITY	10
A. The Contract Clause Protects Private Rights Against Encroachment Based Upon Public Whims And Passing Passions	10
B. Section 340.9 Substantially Impairs Contracts	12
C. On Its Face And As Applied To The Homeowners Here, Section 340.9 Violates The Contract Clause Because It Is Not Tailored To Its Stated Purpose	14
CONCLUSION	18
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247, 109 Cal.Rptr.2d 611 (2001) 15

Allied Structural Steel v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978) 12

Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 154 P.2d 399 (1944) 15

Chase v. Blue Cross of California, 42 Cal.App.4th 1142, 50 Cal.Rptr.2d 178 (1996) 17

Chrysler Corp. v. Kolosso Auto Sales, Inc., 148 F.3d 892 (7th Cir. 1998) 13

Eastern Enterprises v. Apfel, 524 U.S. 498, 141 L.Ed.2d 451, 118 S.Ct. 2131 (1998) 11

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983) 12, 13, 14

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 10

Hellinger v. Farmers Group, Inc., 91 Cal.App.4th 1049, 111 Cal.Rptr.2d 268 (2001) 12

Landgraf v. USI Film Products, 511 U.S. 244, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994) 11

Prudential-LMI Com. Ins. v. Superior Court, 51 Cal.3d 674, 274 Cal.Rptr.2d 387 (1990) 4

State Farm Fire & Cas. Co. v. Superior Court, 210 Cal.App.3d 604, 258 Cal.Rptr. 413 (1989) 14

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 10

TABLE OF AUTHORITIES – Continued

Page

Veix v. Sixth Ward Bldg. & Loan Assn., 310 U.S. 32, 84 L.Ed. 1061, 60 S.Ct. 792 (1940) 13

Vu v. Prudential Prop. & Cas. Ins. Co., 26 Cal.4th 1142, 113 Cal.Rptr.2d 70 (2001) ..... *passim*

STATUTES

28 U.S.C. § 1331 4

28 U.S.C. § 2403(b) 2

California Code of Civil Procedure § 340.9 ..... *passim*

California Insurance Code § 2071 ..... 3, 7

OTHER

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) 6, 13, 17

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) 6, 16, 17

The Federalist No. 44 8

U.S. Const. art. I, § 10, cl. 1 ..... 2, 10

PETITION FOR A WRIT OF CERTIORARI

Allstate Insurance Company respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 322 F.3d 1086 (2003) and is reproduced in the appendix at App. 1. The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for panel rehearing is reproduced at App. 64.

The opinion of the United States District Court for the Central District of California regarding plaintiffs William and Terry Noah is reported at 119 F.Supp.2d 1073 (C.D. Cal. 2000) and is reproduced in the appendix at App. 23. The opinion of the United States District Court for the Central District of California regarding plaintiffs George and Mary Lou Giakoumakis is reported at 97 F.Supp.2d 1211 (C.D. Cal. 2000) and is reproduced in the appendix at App. 30. The opinion of the United States District Court for the Central District of California regarding plaintiff Cheryl Mondheim is unreported and is reproduced in the appendix at App. 38. The opinion of the United States District Court for the Central District of California regarding plaintiffs James and Pat House is reported at 85 F.Supp.2d 980 (C.D. Cal. 2000) and is reproduced in the appendix at App. 51.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 3, 2003. That court denied petitioner's timely petition for panel rehearing on June 2, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

Because this petition calls into question the constitutionality of California Code of Civil Procedure § 340.9, 28 U.S.C. § 2403(b) may apply. Pursuant to 28 U.S.C. § 2403(b), the United States Court of Appeals for the Ninth Circuit notified the California Attorney General of the fact that the constitutionality of California Code of Civil Procedure § 340.9 was drawn into question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition for a writ of certiorari involves:

(1) The Contract Clause of the Constitution of the United States, U.S. Const. Art. I, § 10, cl. 1, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts"; and

(2) California Code of Civil Procedure § 340.9, which is reproduced in full in the appendix. (App. 69.)

STATEMENT OF THE CASE

This petition raises the issue of whether the California legislature acted constitutionally when it retroactively deprived all insurers of the benefits of a substantial

contractual provision, without regard to whether any particular insurer engaged in the type of misconduct the legislation was designed to remedy. This issue is of substantial importance not only to the affected insurers, but to other members of groups in political or public disfavor whose rights are vulnerable to attack.

This case arises out of claims for insurance benefits made to Allstate by William and Terry Noah, George and Mary Lou Giakoumakis, Cheryl Mondheim, and James and Patricia House (collectively, the "Homeowners"). At the time of the January 17, 1994 Northridge, California earthquake, the Homeowners were insured by Allstate. The Homeowners' Allstate policies each contained the following provision:

> No suit or action may be brought against [Allstate] unless there has been full compliance with the policy terms. Any suit or action must be brought within one year after the date of the loss.

By law, all other homeowners insurance policies in California contained a similar provision at least as favorable to the insured. Cal. Ins. Code § 2071; App. 6-7. Such limitations provisions have repeatedly been upheld as consistent with the public policy of preventing fraud and ensuring the diligent prosecution of claims before evidence is lost. *See, e.g., State Farm Fire & Cas. Co. v. Superior Court,* 210 Cal.App.3d 604, 612, 258 Cal.Rptr. 413 (1989).

The one-year period begins running when the insured becomes aware of appreciable damage; is tolled when the insured files a claim; and begins running again after the insurer unequivocally closes the claim (*e.g.*, by final

payment or denial). *Prudential-LMI Com. Ins. v. Superior Court*, 51 Cal.3d 674, 693, 274 Cal.Rptr.2d 387 (1990).

Longstanding California law also precludes insurers from asserting the limitations provision if the insurer misled the insured about the extent of his or her damage. *See, e.g., Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1152-53, 113 Cal.Rptr.2d 70 (2001). As acknowledged by the Ninth Circuit, *Vu* clarified existing California law providing that:

> [W]hen an insurer makes representations of fact regarding the value of an insured's claim, the insurer is estopped from later raising the limitations period as a defense, if the insured reasonably relied on the representations. [citation omitted] There is no need to show that the insurer committed fraud or intended to mislead the insured, only that the insured reasonably relied on the insurer's representations. (App. 8)

Although the earthquake occurred in January 1994, the Homeowners did not file suit against Allstate until January 22, 1998, when they and 21 other plaintiffs sued Allstate in United States District Court for the Central District of California. The Homeowners alleged that Allstate failed to pay all the insurance benefits to which they were entitled as a result of damage caused by the 1994 earthquake. The suit included causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, civil RICO violations, negligence, and negligent and intentional deceit. The district court had jurisdiction under 28 U.S.C. § 1331.

Allstate moved for summary judgment against each Homeowner on the ground that the claims were barred by the contractual one-year suit limitation provision. (App.

25, 32, 40, 53) In opposition, the Homeowners argued that Allstate should be estopped from asserting the one-year provision, but failed to produce evidence showing that the reason they had belatedly filed suit was because they had reasonably relied upon any misrepresentation by Allstate. The District Court granted Allstate's motions and entered judgment for Allstate. (App. 29, 37, 49, 63) Each Homeowner appealed to the United States Court of Appeals for the Ninth Circuit.

In 2000, the California legislature enacted California Code of Civil Procedure § 340.9. The stated purpose of the statute was to provide a remedy for insureds who had been misled by their insurers about the extent of their damage, and who were subsequently precluded by the one-year provision from filing suit:

> The bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses.

(App. 18) The broader legislative history, including the California Senate and Assembly judiciary committee analyses, likewise identified the problem of insurer deception as the validating purpose of the statute. In concluding there was a legitimate public purpose for Section 340.9 sufficient to justify the deprivation of contract rights, the Senate Judiciary Committee observed:

> Proponents assert that ample evidence exists to show that insurers handling Northridge earthquake claims engaged in a systematic program of misleading consumers about the nature and extent of damage to their homes. Later, when it became clear that the problems were indeed significant, proponents assert that the insurers

> refused to pay claims on the basis that the claims were too late.

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 5 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000516_163922_sen_comm.html). *Accord,* Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 8 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000619_115754_asm_comm.html).

Despite the purpose of the statute to provide a remedy for insureds who had been misled to their detriment, Section 340.9 includes no provision limiting its application to insureds who had been misled or to insurers which had been guilty of any misconduct. Section 340.9 provides in pertinent part:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section [January 1, 2001] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. (App. 69)

Section 340.9 took effect while the appeals were pending. As a result of the new statute, the Homeowners argued on appeal that their time-barred claims were now revived, and thus that the judgments had to be reversed. (App. 6) Allstate argued that Section 340.9 is unconstitutional. (App. 6)

Applying the rule that a court should not unnecessarily reach constitutional questions, the Ninth Circuit initially examined whether anything other than Section 340.9 precluded Allstate from asserting the one-year limitation provision. First, the Ninth Circuit concluded that the claims were in fact time-barred under the terms of the contract, even after allowing for the tolling period during Allstate's processing of the claims. (App. 7-8)

Next, the Ninth Circuit considered whether the Homeowners had evidence that they had been misled by Allstate, such that the court could avoid the constitutional issue by finding a triable issue of estoppel under *Vu*, 26 Cal.4th 1142. The court held that the Homeowners had failed to produce such evidence of misleading conduct. (App. 8-9)

Finally, the Ninth Circuit concluded that, assuming constitutionality, Section 340.9 would revive the Homeowners' time-barred claims. (App. 9-15)

The Ninth Circuit then confronted the Contract Clause issue. The Ninth Circuit held in Allstate's favor on the threshold question of whether Section 340.9 substantially impairs contracts:

> *Section 340.9 substantially impairs contracts* between insurers and insured [sic]. It revives claims that would otherwise be barred by the contractual limitations period included in most insurance contracts pursuant to [California Insurance Code] § 2071. It subjects the insurers to potential liability that they believed had long since been put to rest. (App. 17 (emphasis added))

Despite this finding, however, the court concluded that Section 340.9 served a legitimate public purpose, and was "of a character appropriate to the public purpose justifying [the legislation's] adoption." (App. 18-19) The court therefore held Section 340.9 to be constitutional.

The Ninth Circuit rejected Allstate's argument that the stated public purpose of Section 340.9 – protecting insureds who had been misled by insurers – was already achieved by existing California estoppel law as described in *Vu*. The Ninth Circuit also rejected Allstate's argument that Section 340.9 swept too broadly. The Ninth Circuit held that Section 340.9 provided more "complete" protection than existing estoppel law because "it eliminates the need for an insured to present any evidence of the misrepresentations that are a base requirement for equitable estoppel. . . . " (App. 19) The court did not explain how eliminating the need for evidence that an insured was misled was consistent with or furthered the stated statutory purpose of providing a remedy for insureds who had been misled.

REASONS THE PETITION SHOULD BE GRANTED

I.

SUMMARY OF ARGUMENT

The Contract Clause is a "constitutional bulwark in favor of personal security and private rights." The Federalist No. 44, at 301. It provides particular protection to disfavored groups whose rights are vulnerable to attack based upon shifting political winds. To satisfy the Contract Clause, any law that substantially impairs contracts must

do so for a legitimate public purpose, and be reasonably tailored to that purpose.

Section 340.9 violates the Contract Clause because it makes no attempt to tailor its sweeping remedy to its stated purpose. The stated purpose of the statute was to provide a remedy for insureds who had been misled by their insurers about the extent of their Northridge earthquake damage. Yet the statute deprives every insurer of the benefit of the contractual limitation provision, without requiring any showing that the insurer acted culpably or that the insured had been misled. It imposes collective punishment on an entire industry for the perceived abuses of some insurers in handling some claims.

The impairment of contract is absolute for each affected contract, and massive in the aggregate. For each affected contract, Section 340.9 takes away the contractual right to be free from liability and replaces that right with a statutory regime of full liability. In the aggregate, Section 340.9 has spawned lawsuits by thousands of insureds – including many who, like the Homeowners here, cannot show that they were misled – and imposed enormous investigative and legal costs that insurers had a vested contractual right to avoid. Moreover, by reopening claims years after the earthquake when evidence is lost and memories have faded, Section 340.9 invites fraud on a massive scale.

The constitutional infirmities of Section 340.9 implicate issues important to the country's entire business community, and in particular to groups that in any given year may fall into public or political disfavor. Approving such a sweeping governmental abrogation of private contractual rights, years after the fact and without regard

to the culpability of the party whose rights are taken away, must gravely concern banks, accounting firms, securities firms, power companies, landlords, and any other businesses which depend on the stability and enforceability of contracts.

II.

CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 340.9 VIOLATES THE CONTRACT CLAUSE BY IMPOSING COLLECTIVE PUNISHMENT WITHOUT REGARD TO INDIVIDUAL CULPABILITY

A. The Contract Clause Protects Private Rights Against Encroachment Based Upon Public Whims And Passing Passions

The Contract Clause prohibits legislation that impairs contractual obligations. U.S. Const. art. I, § 10, cl. 1. The clause protects citizens "from the effects of those sudden and strong passions to which men are exposed." *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 137-138 (1810). A guiding principle in contract clause interpretation is the "necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments. . . ." *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518, 648 (1819) (majority opinion of Marshall, C.J.).

Retroactive statutes are subject to particular constitutional scrutiny because of the danger they pose to unpopular groups. As the United States Supreme Court recently explained, "[r]etroactivity is generally disfavored in the

law," and "for centuries our law has harbored a singular distrust of retroactive statutes." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 547, 141 L.Ed.2d 451, 118 S.Ct. 2131 (1998) (plurality opn. of O'Connor, J. and concurring and dissenting opn. of Kennedy, J.). This distrust "recogni[zes] that retroactive lawmaking is a particular concern for the courts because of the legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *Id.* at 548 (Kennedy, J., concurring and dissenting) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 128 L.Ed.2d 229, 114 S.Ct. 1483 (1994)). As Justice Kennedy explained in the related context of due process protection:

> Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations can now destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Id. at 549 (Kennedy, J., concurring and dissenting).

As set forth below, Section 340.9 violates the contract clause because it effects a dramatic impairment of a contract provision that has been upheld for decades as advancing public policy, without any attempt to tailor the impairment to the perceived injustice addressed by the statute. Each member of the industry is uniformly punished, without regard to its individual culpability. Every insured is granted new contractual rights at the insurer's expense, without any requirement that the insured show that he or she had been misled.

B. Section 340.9 Substantially Impairs Contracts

To evaluate whether legislation unconstitutionally alters parties' contractual commitments, the Court has developed a three-part test. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13, 74 L.Ed.2d 569, 103 S.Ct. 697 (1983). The first part of the test asks whether the state law operates as a "substantial impairment" of a contractual relationship. *Id.*, 459 U.S. at 411.

Section 340.9 substantially impairs contract rights. By reviving lapsed Northridge earthquake claims, Section 340.9 grants insureds a new right to claim contract benefits while wiping out the insurers' existing contractual right to repose from stale claims. The Ninth Circuit found that Section 340.9 does substantially impair contract rights. (App. 17) *See also Hellinger v. Farmers Group, Inc.*, 91 Cal.App.4th 1049, 1066, 111 Cal.Rptr.2d 268 (2001) ("We agree that reviving contract-barred claims [under Section 340.9] constitutes an impairment of contract.").

Moreover, in Contract Clause analysis, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 245, 57 L.Ed.2d 727, 98 S.Ct. 2716 (1978). "Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Ibid.*

Here, the impairment is absolute. The question is not one of modifying by degrees a party's contractual rights, but rather of replacing a guarantee of no contractual liability with full contractual liability. Moreover, the scope

of the impairment is massive, affecting hundreds of thousands of Northridge earthquake claims. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000619_115754_asm_comm.html). Under Section 340.9, each of those claimants is permitted to bring renewed claims against insurers, imposing on insurers not only potential contractual liability, but the certainty of enormous investigative and litigation costs that otherwise would have been precluded by contract. Because of the passage of time and loss of evidence, the potential for fraudulent and abusive claims is extreme. Thousands of insureds, either individually or in class actions, have brought suit under the statute.

Despite recognizing the impairment, the Ninth Circuit observed that "[t]he severity of the impairment is significantly mitigated . . . by the fact that the California Insurance industry is highly regulated." (App. 17) Here, the Ninth Circuit failed to follow controlling authority of this Court. Although a court may consider a history of regulation, the proper question is not whether the industry was regulated generally, but whether it was regulated "in the particular" respect at issue. *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38, 84 L.Ed. 1061, 60 S.Ct. 792 (1940); *see also Energy Reserves*, 459 U.S. at 411 (citing *Veix*). "[A] history of regulation is never a sufficient condition for rejecting a challenge based on the contracts clause. . . . The fact that some incidents of a commercial activity are heavily regulated does not put the regulated firm on notice that an entirely different scheme of regulation will be imposed." *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998).

Here, while insurers are subject to changing regulation in many respects which they can fairly be required to anticipate, there is no evidence that insurers have been subject to regulation of the contractual limitations provision. To the contrary, contractual limitations periods in insurance policies were originally inserted into policies by insurers, and the only action by the California legislature in respect to those provisions was, in 1909 and in the 1940's, to intervene in favor of the enforceability of such provisions. *Vu*, 26 Cal.4th at 1148.

C. On Its Face And As Applied To The Homeowners Here, Section 340.9 Violates The Contract Clause Because It Is Not Tailored To Its Stated Purpose

If, as here, a state law substantially impairs existing contract rights, it is unconstitutional unless (i) the law serves "a significant and legitimate public purpose," and (ii) "the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves,* 459 U.S. at 411-12. It is here that Section 340.9 fails.

The purpose of Section 340.9 was not to condemn and eliminate contractual limitations provisions as pernicious in their own right. To the contrary, the contractual one-year provision in insurance contracts has been repeatedly upheld as being consistent with good public policy, including the public policies against fraudulent claims and in favor of repose. *State Farm Fire & Cas. Co. v. Superior Court,* 210 Cal.App.3d 604, 612, 258 Cal.Rptr. 413 (1989) ("limitations periods on suits are designed to promote justice by preventing surprises through revival of stale

claims, to protect defendants and courts from handling matters in which the search for truth may be impaired by loss of evidence, to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud") (quoting *Zieba v. Middlesex Mut. Assoc. Co.*, 549 F.Supp. 1318, 1321 (D. Conn. 1982)); *Vu*, 26 Cal.4th at 1148 (the limitation period "is the result of long insistence by insurance companies that they have additional protection against fraudulent proofs, which they could not meet if claims could be sued upon within four years as in the case of actions on other written instruments") (quoting *Bollinger v. National Fire Ins. Co.*, 25 Cal.2d 399, 407, 154 P.2d 399 (1944). The policy in favor of repose is "no less important or substantial than" the policy in favor of resolution on the merits. *Vu*, 26 Cal.4th at 1148-49. The California legislature did not purport to find otherwise.

Rather, the public purpose identified by the California legislature for enacting Section 340.9 was to protect people who were misled by their insurers:

> The Legislature enacted section 340.9 to alleviate a broad and significant problem caused by the insurers' conduct; to help thousands of policyholders who were misled by the insurers into waiving their right to make claims in a timely manner.

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247, 1271, 109 Cal.Rptr.2d 611 (2001). The Ninth Circuit agreed, noting "[t]he bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses." (App. 18)

The legislative history is explicit as to the statute's purpose. In a section entitled "Stated purpose for the legislation," the Senate Judiciary Committee's analysis of the bill stated:

> [The author] claims that numerous homeowners and homeowners associations were mislead [sic] about the extent of damage done as a result of the earthquake, and that once they learned the truth they were prohibited by the statute from filing a claim.

Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 9, 2000, at 3 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000516_163922_sen_comm.html). In the same vein, in discussing whether "there are sufficient public policy reasons to support reviving any otherwise barred claims," the Senate Judiciary Committee focused entirely on the perceived problem of deception:

> Proponents contend that there are strong public policy reasons to protect the homeowners under the circumstances of this bill. Proponents argue that thousands of people who suffered damage to their homes did not receive the benefit of their insurance contracts because of the insurance companies' conduct. Proponents assert that ample evidence exists to show that insurers handling Northridge earthquake claims engaged in a systematic program of misleading consumers about the nature and extent of damage to their homes. Later, when it became clear that the problems were indeed significant, proponents assert that the insurers refused to pay claims on the basis that the claims were too late.

Id. at p. 5. The analysis of the Assembly Committee on Judiciary is essentially identical. Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 8 (www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_ cfa_ 20000619_115754_ asm_comm.html).

Assuming that the goal of protecting insureds who were misled by insurers constitutes a legitimate public purpose, Section 340.9 nevertheless violates the Contract Clause because it sweeps far more broadly than its stated purpose. It is thus not based upon "reasonable conditions" and is not reasonably tailored to achieving its stated purpose. This is so for two reasons.

First, to the extent that the statute benefits insureds who have been misled, it is simply redundant of pre-existing California law – including common law equitable estoppel. As recognized in *Vu*, 26 Cal.4th at 1153-54, for example, "[a]n insurer is estopped from asserting a right, even though it did not intend to mislead, as long as the insured reasonably relied to its detriment upon the insurer's action." *Vu,* 26 Cal.4th at 1153 (quoting *Chase v. Blue Cross of California,* 42 Cal.App.4th 1142, 1147, 50 Cal.Rptr.2d 178 (1996)). This existing remedy is broad enough to accomplish the stated purpose of the statute.

Second, even assuming that Section 340.9 provided some extra remedy consistent with the legitimate purpose of the statute to protect insureds who were misled, the statute sweeps far too broadly. It does not, for example, merely relax the requirements for proving misconduct by an insurer, but eliminates any such requirement altogether. By reviving stale claims years after the earthquake, it invites the very fraud that the limitation

provision is designed to prevent. The statute also rewards insureds who failed to timely pursue their claims due to lack of diligence. Section 340.9 thus fails to impose the required "reasonable conditions" upon the deprivation of contractual rights, nor is it reasonably tailored to the statute's stated purpose. It does not punish merely the culpable insurer, but the guiltless one. It does not benefit merely the duped insured, but the insured who knowingly sat on his rights.

Section 340.9 is an instance of collective punishment. The only prerequisite to the punishment is that one be a member of the disfavored group – here, earthquake insurers. If a company is a member of this group, the statute takes away the company's vested contractual rights. The statute imposes no requirement on the insured to show that he is within the class of persons intended to be protected. Nor does the statute provide any mechanism by which an insurer can escape this deprivation, even if the insurer can show that it is innocent of any misconduct.

CONCLUSION

Approving a statute that imposes collective punishment on an entire industry without regard to individual culpability raises profound concerns not just for insurance companies, but for all industries that rely upon the predictable enforcement of contractual rights. For this reason,

and for all of the reasons discussed above, the Court should grant this petition.

Respectfully submitted,

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August 29, 2003

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APPENDIX

322 F.3d 1086

Vito CAMPANELLI; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; George Giakoumakis; Mary Lou Giakoumakis; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

James House; Pat House,
Plaintiffs-Appellants,

v.

ALLSTATE [ ] INSURANCE COMPANY,
an Illinois Corporation,
Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies, Defendants.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; George Giakoumakis; Mary Lou Giakoumakis; James House; Pat House; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt;

Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

Cheryl Mondheim, Plaintiff-Appellant,

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies Defendants.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung; James House; Pat House; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; William Noah; Terry Noah; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber; Donald Huber, Plaintiffs,

and

George Giakoumakis; Mary Lou Giakoumakis; Plaintiffs-Appellants,

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee.

Vito Campanelli; Peggy Campanelli; John Caudillo; Barbara Caudillo; Neil Damrow; Gayle Damrow; Nancy Durrant; Garfield Ecung; Debra Ecung;

George Giakoumakis; Mary Lou Giakoumakis; James House; Pat House; Donald Huner; Tommie Jenkins; Carrie Jenkins; Brenda Kalosh; Donald Menck; Florence Menck; Cheryl Mondheim; Roy Rosenblatt; Lorraine Rosenblatt; Darla Severn; Loyal Smith; Mildred Stafford; Marilyn Taber, Plaintiffs,

and

**William Noah, Terry Noah,
Plaintiffs-Appellants,**

v.

Allstate [ ] Insurance Company, an Illinois Corporation, Defendant-Appellee,

and

Shadowbrook Design Group, Inc., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies, Defendants.

Nos. 00-55466, 00-55468, 00-55957 and 00-57080.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 2002.

Filed March 3, 2003.

Norman J. Watkins, Lynberg & Watkins, Los Angeles, CA, for plaintiffs-appellants.

Peter H. Klee, Luce, Forward, Hamilton & Scripps, San Diego, CA, for defendant-appellee.

Anne Michelle Burr, Deputy Attorney General, San Francisco, CA, for amicus curiae Bill Lockyer, Attorney General of the State of California, urging reversal.

Stephanie Rae Williams, Horvitz & Levy, Encino, CA, for amici curiae 21st Century Insurance Company and Truck Insurance Exchange, urging affirmance.

Appeals from the United States District Court for the Central District of California; Robert J. Kelleher, District Judge, Presiding. D.C. No. CV 98-7185 RJK.

Before: BRIGHT,* GOODWIN, and TASHIMA, Circuit Judges.

TASHIMA, Circuit Judge:

These are appeals from the district court's grant of summary judgment in favor of appellee, Allstate Insurance Company ("Allstate"), based upon a limitations-period defense. We reverse.

BACKGROUND

Appellants William and Terry Noah, James and Patricia House, Cheryl Mondheim, and George and Mary Lou Giakoumakis (collectively, the "Homeowners") all own homes, insured by Allstate, that were damaged on January 17, 1994, by the Northridge earthquake. Within the next year, all of the Homeowners made claims to Allstate for the earthquake damage to their homes. All of them received payments for the damage and their claims were closed by Allstate over the next two years.

Sometime in May 1998, the Homeowners learned that there were questions regarding the authenticity of the

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* The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

engineering reports they had received from Allstate during the claims adjustment process. The "engineering" reports that each Homeowner received were purportedly signed, stamped, and certified to contain the signing engineer's opinion of the extent of the earthquake damage based upon the engineer's personal inspection of the home. The Homeowners allege that, in fact, the reports were not prepared by engineers, engineers never inspected their homes, and that, as a result, their insurance claims were undervalued, causing the Homeowners to receive less than complete compensation for the damage to their homes.

On September 2, 1998, the Homeowners joined 20 other plaintiffs in a suit against Allstate. In their complaint, they alleged the following causes of action against Allstate: (1) violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-68, based on mail fraud; (2) negligence; (3) negligent misrepresentation; (4) intentional misrepresentation; (5) breach of the covenant of good faith and fair dealing; and (6) breach of contract.

Allstate filed separate summary judgment motions against each of the Homeowners, asserting that their claims were barred by the one-year limitations period of their insurance contracts. The district court granted all of these motions. *See Campanelli v. Allstate Ins. Co.,* 119 F.Supp.2d 1073 (C.D.Cal.2000); *Campanelli v. Allstate Ins. Co.,* 97 F.Supp.2d 1211 (C.D.Cal.2000); *Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980 (C.D.Cal.2000).

All of the Homeowners appealed, contending that their claims were not time-barred. The Homeowners base their appeals on several grounds, including: (1) that the limitations period did not begin to run until they

discovered the fraudulent nature of the engineering reports; (2) that Allstate is equitably estopped from asserting the limitations period as an affirmative defense; and (3) that their claims were revived by California Code of Civil Procedure § 340.9, which became effective on January 1, 2001, while these appeals were pending.

DISCUSSION

The Homeowners' argument based on § 340.9 is their strongest and, if upheld, would favorably resolve these appeals. Allstate, however, challenges the constitutionality of § 340.9. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445-46, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). Therefore, we will address the constitutionality of § 340.9 only if none of the Homeowners' other grounds would resolve all of these appeals in the Homeowners' favor. *See id.* at 446, 108 S.Ct. 1319.

I Inception of the Loss

The district court granted summary judgment against the Homeowners on all of their claims, finding that the one-year limitations period under their contracts, which conformed to California Insurance Code § 2071, had expired. Section 2071 is not technically a statute of limitations. Rather than directly imposing a limitations period on certain causes of action, § 2071 provides a standard insurance contract for all insurance policies that include fire coverage. This contract must include the following limitations period provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins.Code § 2071. Under this provision, any claim that is "on the policy" must be brought within 12 months of the "inception of the loss" or it is time-barred.

The Homeowners argue that their claims are not barred by the expiration of the one-year limitations period because the period did not begin to run until the Homeowners discovered that Allstate had hidden the true extent of the damage to their homes. We cannot agree. Under California law, the one-year limitations period begins to run at the time of the inception of the loss, which is "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Commercial Ins. v. Superior Court,* 51 Cal.3d 674, 274 Cal.Rptr. 387, 798 P.2d 1230, 1232 (1990). The inception of the loss occurs when the insured should have known that appreciable damage had occurred, not when the homeowner learned the true extent of the damage. *See id.*

In these cases, the inception of the loss occurred when the Homeowners realized that their homes had been damaged by the Northridge earthquake. All of the Homeowners clearly realized that they had suffered sufficient damage to warrant contacting Allstate, because they did, in fact, contact Allstate. As a result, the inception of the loss in this case was January 17, 1994, the date of the Northridge earthquake, and the one-year limitations

period began to run on that date. The Homeowners' complaint was filed on September 2, 1998. Even taking into consideration the fact that the limitations period was tolled during Allstate's processing of the claims, the one-year limitations period had expired for those claims that were covered by that limitations period.

II Estoppel

The Homeowners argue that even if the one-year limitations period had expired at the time that their lawsuit was filed, Allstate is now equitably estopped from asserting the limitations period as a defense because of the Homeowners' reliance on the allegedly fraudulent engineering reports provided by Allstate.

In *Vu v. Prudential Property & Casualty Insurance Co.*, 26 Cal.4th 1142, 113 Cal.Rptr.2d 70, 33 P.3d 487 (2001), the California Supreme Court recently clarified California equitable estoppel law as it relates to insurance limitations periods. *Vu* established that when an insurer makes representations of fact regarding the value of an insured's claim, the insurer is estopped from later raising the limitations period as a defense, if the insured reasonably relied on the representations. *Id.* 113 Cal.Rptr.2d 70, 33 P.3d at 493. There is no need to show that the insurer committed fraud or intended to mislead the insured, only that the insured reasonably relied on the insurer's representations. *Id.*

The Homeowners' case for equitable estoppel appears strong, as it is alleged in their complaint. They claim that they received fraudulently-prepared engineering reports from Allstate that understate the damage to their homes and that they relied on these reports to their detriment.

The difficulty in their cases arises from their failure to present certain evidence to oppose Allstate's summary judgment motion.

Homeowners House and Mondheim cannot succeed on their claim for equitable estoppel because they did not present any evidence that showed that they had received the engineering reports mentioned in the complaint or that Allstate had made any representations of fact regarding the extent of the damage to their homes. Without this evidence, these appellants cannot claim to have reasonably relied on a misrepresentation by Allstate. Therefore, Allstate is not estopped from asserting the limitations period as a defense against these Homeowners.

III Section 340.9

Because the limitation period has expired for those claims that are "on the policy" and Allstate is not equitably estopped from raising the limitations period as a defense against some of the Homeowners, we now address the question of whether § 340.9 revives the time-barred claims. We hold that it does and that such revival is constitutional.

Section 340.9 came into effect on January 1, 2001. It revives "insurance claim[s] for damage arising out of the Northridge earthquake" that are barred "solely because the applicable statute of limitations has or had expired. . . . " § 340.9(a).[1] Section 340.9 also revives claims

[1] Section 340.9 provides, in full:

(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the

(Continued on following page)

that are barred by statutorily-mandated contractual limitations periods, such as those involved in this case. *See* § 340.9(a) (reviving claims "[n]otwithstanding any other provision of law or contract"); *20th Century Ins. Co. v. Superior Court,* 90 Cal.App.4th 1247, 109 Cal.Rptr.2d 611, 634-35 (2001).

Section 340.9 applies only to cases in which the insured contacted the insurer prior to January 1, 2000,

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Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

(d) This section shall not apply to either of the following:

(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

(2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement.

Cal.Civ.Proc.Code § 340.9.

regarding potential Northridge earthquake damage. § 340.9(a). It gave plaintiffs until January 1, 2002, to bring suit on their revived claims. § 340.9(b). Finally, § 340.9 has no effect on any claim that had been "litigated to finality in any court of competent jurisdiction" prior to January 1, 2001. § 340.9(d).

A. *"Litigated to Finality."*

Allstate asserts that the Homeowners' claims are not revived by § 340.9 because the district court orders granting summary judgment in favor of Allstate were all filed prior to January 1, 2001. Allstate argues that because these orders are "final judgments," the claims have been litigated to finality and are not revived by § 340.9. We reject this argument and hold that, for purposes of § 340.9, a claim has not been litigated to finality until there has been a "final resolution of the matter on appeal" or until the time for taking an appeal has expired without an appeal having been taken. *Hellinger v. Farmers Ins. Exchange,* 91 Cal.App.4th 1049, 111 Cal.Rptr.2d 268, 277-78 (2001); *see also Vu v. Prudential Prop. & Cas. Ins. Co.,* 291 F.3d 603, 605 (9th Cir. 2002); *Bialo v. W. Mut. Ins. Co.,* 95 Cal.App.4th 68, 115 Cal.Rptr.2d 3, 13-14 (2002).

Although the judgments entered against Homeowners were "final judgments," the Homeowners' claims had not been litigated to finality. Under California law, "[a]n action is deemed to be pending from the time of its commencement until its final determination upon appeal. . . ." *Hellinger,* 111 Cal.Rptr.2d at 277 (quoting *McKee v. Nat'l Union Fire Ins. Co.,* 15 Cal.App.4th 282, 19 Cal.Rptr.2d 286, 289 (1993) (quoting Cal.Code Civ. Proc. § 1049)); *see also In re Marriage of Buol,* 39 Cal.3d 751, 218 Cal.Rptr.

31, 705 P.2d 354, 356 (1985) (holding that proceedings that were on appeal were "not yet final"). Because the Homeowners' claims were on appeal on January 1, 2001, they were not litigated to finality and are within the scope of § 340.9.[2]

B. *Tort and RICO claims*

Allstate also asserts that even if § 340.9 applies to the Homeowners' claims, it revives only their contract claim, not their tort claims. It contends that "insurance claims for damages," under § 340.9, do not include tort claims.

The California courts of appeal that have dealt with § 340.9 have not so limited its reach. In *Bialo,* 115 Cal.Rptr.2d at 13, the court revived plaintiff's claims for breach of contract and tortious breach of the covenant of good faith and fair dealing. In *Hellinger,* 111 Cal.Rptr.2d at 283-84, the court revived plaintiff's claims for bad faith and punitive damages. In *20th Century,* the court held that § 340.9 revived the plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims, but held that § 340.9 did not revive the plaintiff's fraud claim because that claim was not covered by the one-year limitations period for insurance claims in the first place. 109 Cal.Rptr.2d at 638.

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[2] The meaning of "litigated to finality" is to be determined under state law because it defines one limit of the substantive right created by § 340.9. Thus, contrary to Allstate's contention, the meaning of such terms as "final judgment" for federal procedural purposes is not controlling.

We hold that § 340.9 revives all causes of action that fall within the limitations period of Insurance Code § 2071. Section 340.9 revives "any insurance claim for damages" that is barred solely because the statute of limitations has expired. Under California law any claim that is "grounded in a failure to pay benefits that are due under the policy" is treated as "on the policy" for purposes of § 2071's limitations period. *Prieto v. State Farm Fire & Cas. Co.,* 225 Cal.App.3d 1188, 275 Cal.Rptr. 362, 365-66 (1990). There is no indication that the California legislature intended to revive only a subset of the actions that would be barred by the statutorily-imposed insurance limitations period. Therefore, any claim that is covered by the one-year limitations period of Insurance Code § 2071 is revived by § 340.9.

As a result, we must next decide which of the claims are covered by § 2071's one-year limitations period in order to determine which causes of action are revived by § 340.9. The one-year limitations period applies to all claims that are "grounded in a failure to pay benefits that are due under the policy." *Id.* at 365-66. "[A]n action seeking damages recoverable under the policy for a risk insured under the policy" is "on the policy" and covered by the one-year limitations period. *Jang v. State Farm Fire & Cas. Co.,* 80 Cal.App.4th 1291, 95 Cal.Rptr.2d 917, 924 (2000) (holding that claims for civil conspiracy and bad faith were on the policy); *see also CBS Broad. Inc. v. Fireman's Fund Ins. Co.,* 70 Cal.App.4th 1075, 83 Cal.Rptr.2d 197, 203 (1999) (holding that action for breach of good faith and fair dealing was on policy). The fact that an insured seeks damages in addition to those covered by the policy will not render the cause of action "off the policy." *See*

Velasquez v. Truck Ins. Exch., 1 Cal.App.4th 712, 5 Cal.Rptr.2d 1, 5-6 (1991).

The Homeowners' causes of action for negligence and for breach of the covenant of good faith and fair dealing are "on the policy." Those claims are based on Allstate's alleged mishandling of the Homeowners' claims and seek to recover damages based on the underpayment of their claims.

The Homeowners' causes of action for negligent and intentional misrepresentation are also on the policy and thus are revived by § 340.9. These causes of action also seek to recover for damage to their homes that the Homeowners allege should have been covered under their respective insurance policies. The complaint also alleges that Allstate's misrepresentations involved "the scope, competence and fairness of the investigations into the [Homeowners'] claim for covered loss under the policy." These claims are "grounded in a failure to pay benefits that are due under the policy" and are therefore covered by the one-year limitations period. *Prieto,* 275 Cal.Rptr. at 365-66.

All of Homeowners' state-law causes of action are revived, removing any limitations-period defense Allstate may have had regarding those claims. This leaves only the RICO claims. The parties contest whether the RICO claims are "on the policy" and whether the contractual limitations periods, which are mandated by state law, could shorten the limitations period of a federal cause of action if they were. We need not, however, reach this issue on these appeals. Regardless of the answer to this question, the RICO claims are not time-barred by § 2071's limitations period. On the one hand, if the one-year

limitations period does not apply to or cannot alter the limitations period of the RICO claims, then the district court's summary judgment based on the one-year limitations period must be reversed. On the other hand, if § 2071's one-year limitations period does apply to the RICO claim and can affect its limitation period, then the one-year limitations period was, like the state-law claims, reinstated by § 340.9.[3] In either event, the RICO claims are not barred by § 2071's one-year limitations period, which was the basis of the district court's summary judgment.

C. *Contract Clause*

Because we have held that § 340.9 revives the Homeowners' previously-barred claims, we must reach Allstate's constitutional challenges to the statute. First, Allstate asserts that if § 340.9 revives the Homeowners' claims, then it violates the contract clauses of both the federal and California Constitutions. The federal Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. The California Constitution provides that a "law impairing the obligation of contracts may not be passed." Cal. Const., art. I, § 9. The California Supreme Court uses the federal Contract Clause analysis for determining whether a

[3] Although we hold that § 340.9 removes any state-law limitations period defense that Allstate may have, the question of whether § 340.9 can revive a RICO claim, if the federal four-year limitations period has already expired, remains open. This question is not before us in this case because Allstate's summary judgment motions were based only on § 2071's one-year limitations period.

statute violates the parallel provision of the California Constitution. *See Calfarm Ins. Co. v. Deukmejian,* 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247, 1262-63 (1989) (holding that a statute that passed the federal test did not violate either the federal or state Constitutions).

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State. . . ." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 410, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983). The threshold inquiry in Contract Clause analysis is " 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Id.* at 411, 103 S.Ct. 697 (quoting *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)). "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel,* 438 U.S. at 245, 98 S.Ct. 2716. The more severe the impairment, the more searching the examination of the legislation must be. *Id.*

In determining the extent of the impairment, a court must consider "whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves,* 459 U.S. at 411, 103 S.Ct. 697. If the industry has been heavily regulated, then the impairment is less severe because " '[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' " *Id.* (quoting *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357, 28 S.Ct. 529, 52 L.Ed. 828 (1908)).

Even if a state regulation does constitute a substantial impairment of contract, it is still constitutional if the

state has a "significant and legitimate public purpose behind the regulation." *Energy Reserves,* 459 U.S. at 411-12, 103 S.Ct. 697. The regulation need not be addressed to an emergency or temporary situation. *Id.* at 412, 103 S.Ct. 697.

Once a legitimate public purpose has been identified, the final step of the Contracts Clause analysis is to determine "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697 (quoting *United States Trust Co. v. New Jersey,* 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) (alterations in the original)). Unless the state is a party to the contract, courts " 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Id.* at 412-13, 103 S.Ct. 697 (quoting *United States Trust,* 431 U.S. at 22-23, 97 S.Ct. 1505); *see also Seltzer v. Cochrane (In re Seltzer),* 104 F.3d 234, 236 (9th Cir. 1996).

Section 340.9 substantially impairs contracts between insurers and insured. It revives claims that would otherwise be barred by the contractual limitations period included in most insurance contracts pursuant to § 2071. It subjects the insurers to potential liability that they believed had long since been put to rest. The severity of the impairment is significantly mitigated, however, by the fact that the California insurance industry is heavily regulated. *See Calfarm,* 258 Cal.Rptr. 161, 771 P.2d at 1262 (holding that the insurance industry is a highly-regulated industry in which further regulation can reasonably be anticipated).

This particular impairment is also less severe because the limitations period in the contracts is mandated by statute. Section 2071 requires all insurance policies that contain fire coverage to include a provision giving the insured one year from the inception of the loss to bring any claim under the contract. The provisions were not bargained for and are subject to an existing statute; therefore, impairment of these provisions is less severe.

Given the highly-regulated nature of the California insurance industry and the statutory underpinnings of the contractual limitations clause, § 340.9's interference with contracts, while substantial, is not so severe as to render the statute unconstitutional.

Although § 340.9 substantially impairs contracts, it was passed for a legitimate public purpose. Section 340.9 was introduced as Senate Bill No. 1899 "to bring needed relief to the victims of the Northridge earthquake." Sen. Comm. on Judiciary, Analysis of Sen. Bill. No. 1899 (1999-2000); *see also Hellinger,* 111 Cal.Rptr.2d at 275. The bill's author believed that the one-year limitations period had barred victims from being fairly compensated after they had been misled about the extent of their losses. *See id.* at 275. Protecting the rights of victims of the Northridge earthquake is a significant and legitimate public purpose.

Allstate argues that § 340.9 no longer serves any legitimate state purpose after the California Supreme Court's decision in *Vu,* 113 Cal.Rptr.2d 70, 33 P.3d at 493-94. It contends that the doctrine of equitable estoppel, as clarified in *Vu,* fully protects victims of the Northridge earthquake; therefore, that the purpose behind § 340.9 has been made obsolete.

Although *Vu* does provide some protection for victims of the Northridge earthquake, its protection is not as complete as that of § 340.9. As demonstrated by this case, not all insureds will be able to take advantage of the *Vu* holding, even if they are alleging significant malfeasance on the part of the insurer. Section 340.9 eliminates the need for an insured to present any evidence of the misrepresentations that are a base requirement for equitable estoppel under *Vu* and protects all insureds who were not fully compensated for their losses, so long as they meet the requirements of § 340.9. *Vu* clearly reduced the need for § 340.9, but we cannot say that it entirely eliminated it. Despite that decision, § 340.9 is still based on a legitimate public purpose. Moreover, § 340.9 also protects a larger class of homeowners than those that would benefit from *Vu,* namely, those who contacted their insurers about earthquake damage by January 1, 2000, whereas *Vu* applies only to homeowners who had filed claims.

Finally, § 340.9 is "of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697. Although § 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims regardless of whether the insurance company has been shown to have acted wrongly, it is not so broad as to be unconstitutional. Despite its breadth, § 340.9 is not without limits. Section 340.9 revives only claims that resulted from the Northridge earthquake, a one-time event with a discrete, albeit large, number of victims. Additionally, only plaintiffs who had contacted an insurer prior to January 1, 2000, have their claims revived. § 340.9(b). This helps to exclude fraudulent claims that were invented just to take advantage of § 340.9's

passage. Nor are insurance companies subjected to ongoing liability, because the claims were revived for only one year. Given the substantial deference given to legislative judgment as to the necessity and reasonableness of economic statutes, § 340.9 is "of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves,* 459 U.S. at 412, 103 S.Ct. 697.

Given the highly-regulated nature of the insurance industry in California and the relatively moderate level of impairment of contract, the legitimate public purpose of the statute, and the reasonableness of the scope of the statute in carrying out its public purpose, we hold that § 340.9 does not violate the contract clause of either the federal or California Constitutions.

D. *Due Process*

Allstate also contends that § 340.9 violates the due process clauses of both the federal and California Constitutions by retroactively impairing vested contractual rights. Under the federal Constitution, retrospective economic legislation must only pass rational basis review: the statute must be based on "a legitimate legislative purpose furthered by rational means." *Gen. Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). For the reasons discussed above, § 340.9 passes this test.

Allstate argues that the result is different under California's due process clause because the California Supreme Court has prohibited the revival of expired claims in *Chambers v. Gallagher,* 177 Cal. 704, 171 P. 931 (1918). In *Chambers,* the California Supreme Court held that a statute that removed the statute of limitations

defense in proceedings to enforce payment of inheritance taxes was unconstitutional. *Id.* at 933. *Chambers,* however, has since been limited in its application. In *People v. Frazer,* 21 Cal.4th 737, 88 Cal.Rptr.2d 312, 982 P.2d 180, 205 n. 32 (1999), the California Supreme Court refused to declare a revival statute unconstitutional based on *Chambers.* The court noted that *Chambers* had not been used by any court to strike down a statute in a civil case not involving some form of tax dispute. *Id.* This effectively limits *Chambers'* holding to tax cases. This is not a tax case; therefore, *Chambers* is not controlling. If § 340.9 passes the normal due process test for retroactive application of a statute under the California Constitution, then it is constitutional.

Under the California Constitution, a statute can only be applied retroactively to impair vested rights if retroactive application "'reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment.'" *In re Marriage of Bouquet,* 16 Cal.3d 583, 128 Cal.Rptr. 427, 546 P.2d 1371, 1376 (1976) (quoting *Addison v. Addison,* 62 Cal.2d 558, 43 Cal.Rptr. 97, 399 P.2d 897, 902 (1965)). In determining whether a retroactive law violates the California due process clause, California courts consider: (1) the significance of the state interest served by the law; (2) the importance of retroactive application of the law to the effectuation of the interest; (3) the extent and legitimacy of the reliance on the former law; (4) the extent of actions taken on the basis of that reliance; and (5) the extent to which the retroactive application of the new law would disrupt those actions. *Id.*

Applying these factors demonstrates that § 340.9 "reasonably could be believed to be sufficiently necessary to the public welfare as to justify the impairment." *Id.* The

statute was passed to serve the significant state interest of ensuring that those injured by the Northridge earthquake are fully compensated for their losses. The California legislature determined that the claims procedures employed after the Northridge earthquake were not fair to all homeowners. The retroactive application of § 340.9 was essential to protecting the rights of those injured by the earthquake because most, if not all, of their claims were barred by the statutorily-imposed contractual limitations clause. Allstate, and other insurers, could not legitimately rely to any great extent on the one-year limitations period because it was mandated by statute and the insurance industry as a whole is heavily regulated. Finally, although § 340.9 significantly disrupts the insurer's actions, the legislature could have reasonably believed that § 340.9 was necessary to the public welfare because of the magnitude of the harm caused by the earthquake and the perceived problems of insurer malfeasance.

We conclude that § 340.9 does not violate the due process clause of the federal or California Constitutions.

CONCLUSION

The judgments of the district court dismissing the Homeowners' claims are reversed and the cases remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

119 F.Supp.2d 1073

Vito CAMPANELLI, et al., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY, et al., Defendants.

No. CV 98-7185 RJK.

United States District Court,
C.D. California.

Oct. 17, 2000.

Norman J. Watkins, Ruth Segal, Stephen M. Harber, Los Angeles, CA, for plaintiffs.

Peter H. Klee, Angela J. Hansen, Nathan S. Arrington, William Grant Peterson, Luce Forward Hamilton & Scripps, San Diego, CA, for defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS WILLIAM AND TERRY NOAH

KELLEHER, District Judge.

On August 24, 2000, Defendant Allstate Insurance Company ("Allstate") filed a motion for summary judgment against Plaintiffs William and Terry Noah (collectively, "the Noahs"). The Noahs opposed the motion. The Court heard oral argument on October 16, 2000 and, having considered the papers, pleadings, and records on file herein, the Court *grants* Allstate's motion for summary judgment in its entirety.

BACKGROUND FACTS

The following facts are not disputed. The Noahs are Allstate policyholders. They suffered property damage to their home as a result of the 1994 Northridge earthquake. The Noahs reported a claim to Allstate on January 13, 1995.

Allstate resolved their claim under their homeowners' policy and closed the claims file by letter dated August 21, 1996. In this letter, Allstate informed the Noahs that their insurance policy contained a one-year limitations provision that required them to bring any lawsuit within one year of the date of their loss.

On September 6, 1996, Allstate made an additional payment to the Noahs for the loss of kitchen facilities during the repairs to their home. Allstate again notified the Noahs that Allstate had concluded their claim and that their insurance policy contained a one-year limitations provision that required them to bring any lawsuit within one year of the date of their loss.[1]

On May 4, 1998, the Noahs joined 28 other plaintiffs (collectively, "Plaintiffs") in the instant suit against Allstate and Allstate's contractors alleging fraud in the

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[1] Both the August 21, 1996 and September 6, 1996 letters state as follows:

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Lodgment of Exhibits, Exhs. 7, 10.

adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Defendant Shadowbrook, an engineering company retained by Allstate to help with claims investigations, were unlicensed. In addition, some of the engineering reports from Shadowbrook were allegedly ghostwritten by Defendant Western States. As a result, Plaintiffs contend that they settled their claims for less than they were worth. Both Shadowbrook and Western States defaulted. Allstate is the sole remaining defendant.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract

Allstate moves for summary judgment limited to the Noahs, arguing that their claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to

a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir.1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead,

the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir.1997), quoting *Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. *The Noahs' Claims Are Barred By The Statute Of Limitations.*

Under this Court's previous rulings in this case, the one-year limitations period contained in the Noahs' insurance polices [sic] as well as in California Insurance Code Section 2071 governs the Noahs' state as well as RICO claims. *See Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980, 984 (C.D.Cal.2000) (Kelleher, J.) ("[t]he [Plaintiffs'] lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of the [Plaintiffs'] property damage claim. Accordingly, the [Plaintiffs'] action is 'on the policy,' and therefore subject to the one-year time bar."); *Campanelli v. Allstate Ins. Co.,* 97 F.Supp.2d 1211, 1214 (C.D.Cal.2000) (Kelleher, J.) ("Despite RICO's inherent four-year limitations period, a one-year time bar applies to the RICO claim in this case. The contract of insurance between Allstate and [Plaintiffs] specifically provides for a one-year time bar. . . . Since Allstate and the [Plaintiffs] contracted for a 'reasonable' limitations period under California law, any claim arising under that policy would be measured against the one-year time bar. . . . [A]ll of the Plaintiffs' claims –

including the RICO claim – arise out of their respective policies of insurance.").

Although the dates and times differ slightly as to the Noahs' claims, the legal analysis and resulting conclusion are identical to those of the other *Campanelli v. Allstate* plaintiffs – namely, plaintiffs Cheryl Mondheim, James and Pat House, and George and Mary Lou Giakoumakis – against whom this Court granted summary judgment under the applicable one-year statute of limitations. Summary judgment is therefore appropriate as to the Noahs.

B. *The Noahs' Reliance On Senate Bill 1899 Is Premature.*

The Noahs argue that their claims are not consigned to the same fate as that of Ms. Mondheim, the Houses, and the Giakoumakises, because of the enactment of Senate Bill 1899 ("SB 1899").

On September 30, 2000, Governor Gray Davis signed legislation enacting SB 1899, which adds Section 340.9 to the California Code of Civil Procedure and provides, in pertinent part:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section.

Cal. Civ. Proc. § 340.9(a).

Most notably, however, SB 1899 does not apply to claims that have been "litigated to finality in any court of competent jurisdiction" before the effective date of SB 1899, or to any written compromised settlement agreements entered into between an insurer and its insured where the insured was represented by counsel. Cal. Civ. Proc. §§ 340.9(d)(1) & (2).

SB 1899 does not become effective until January 1, 2001. Meanwhile, the Noahs' claims are subject to summary judgment based on the expiration of the statute of limitations. Summary judgment constitutes a final adjudication on the merits. *See, e.g., Rand v. Rowland,* 154 F.3d 952, 957 (9th Cir.1998) ("[A] grant of summary judgment is a final adjudication on the merits.") (citing *Griffith v. Wainwright,* 772 F.2d 822, 825 n. 4 (11th Cir.1985) and 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure:* Jurisdiction Section 4444 (1981)). Having been litigated to finality in a court of competent jurisdiction before the effective date of SB 1899, the Noahs' claims cannot be revived by SB 1899.

DISPOSITION

Allstate's Motion For Summary Judgment Against Plaintiffs William and Terry Noah is GRANTED.

IT IS FURTHER ORDERED that counsel for Allstate submit a Judgment to this effect in accordance with the Local Rules.

IT IS SO ORDERED.

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97 F.Supp.2d 1211

Vito CAMPANELLI; et al., Plaintiffs,

v.

ALLSTATE INSURANCE COMPANY; et al., Defendants.

No. CV 98-7185 RJK.

United States District Court,
C.D. California.

May 15, 2000.

Luce, Forward, Hamilton & Scripps by Peter Klee, Nathan S. Arrington, Angela Hansen, Seth Friedman, Jeffrey Commisso, San Diego, CA, for Allstate.

ORDER GRANTING DEFENDANT ALLSTATE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS GEORGE AND MARY LOU GIAKOUMAKIS

KELLEHER, District Judge.

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiffs George and Mary Lou Giakoumakis (together, the "Giakoumakises") on April 17, 2000. Because the parties adequately represent their positions in their moving and opposing papers, the Court waives oral argument. *See* C.D. Local R. 7.11. Having considered the parties' briefs and declarations, the Court now ***grants*** Allstate's motion for summary judgment.

FACTUAL BACKGROUND

The following facts are not disputed. Plaintiffs George and Mary Lou Giakoumakis (together, the

"Giakoumakises") are Allstate policyholders. They suffered property damage to their home in Woodland Hills, California as a result of the 1994 Northridge earthquake. The Giakoumakises reported a claim to Allstate on January 19, 1994.

Allstate resolved their claim under their homeowners' policy and closed the claims file by letter dated August 16, 1994. The Giakoumakises objected to Allstate's low settlement and challenged Allstate's inspection. Allstate conducted further inspections, and wrote two additional checks to the Giakoumakises on June 14 and July 21, 1995. In September 1995, the Giakoumakises complained further, but Allstate responded that they had been compensated fully for their loss.

Allstate's June 14, 1995 letter informed the Giakoumakises that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Lodgment of Exhibits, Ex. 5 (April 17, 2000).

On September 2, 1998, the Giakoumakises, joined with 28 other plaintiffs, brought this suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Defendant Shadowbrook, an engineering company retained by Allstate to

help with claims investigations, were unlicensed. In addition, some of the engineering reports from Shadowbrook were allegedly ghostwritten by Defendant Western States. As a result, Plaintiffs contend that they settled their claims for less than they were worth. Both Shadowbrook and Western States defaulted. Allstate is the sole remaining defendant.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

Allstate moves for summary judgment against the Giakoumakises only, arguing that their claims are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir.1987). The court

must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). [T]he burden on the moving party may be discharged by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125

F.3d 1328, 1331 (9th Cir.1997), *quoting Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505.

DISCUSSION

This Court resolved a nearly identical motion for summary judgment earlier this year. *See Campanelli v. Allstate Ins. Co.,* 85 F.Supp.2d 980, 984 (C.D.Cal.2000) (Kelleher, J.). In that decision, the Court held – with respect to different plaintiffs, James and Pat House – that the claims against Allstate were time-barred. *See id.* at 984. The dates and times of the Houses' claims differ slightly from the Giakoumakises' claims, but the legal analysis and resulting conclusion is the same. Summary judgment is therefore appropriate.

The Court takes this opportunity to expand upon one issue resolved implicitly, though not explicitly, in its published order in the Houses' case. That order did not explain why the one-year time-bar contained in the Plaintiffs' policies, and in Cal.Ins.Code § 2071, applies to the Plaintiffs' RICO claim, when federal courts have interpreted RICO to contain a four-year statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (implying a four-year limitations period by analogy to the Clayton Act). The Supreme Court recently reaffirmed that RICO's limitations period is four years and clarified when that time period begins to run. *See Rotella v. Wood,* ___ U.S. ___, ___-___, 120 S.Ct. 1075, 1079-80, 145 L.Ed.2d 1047 (2000).

Despite RICO's inherent four-year limitations period, a one-year time bar applies to the RICO claim in this case. The contract of insurance between Allstate and the

Giakoumakises specifically provides for a one-year time bar. Under California law, parties may contract for a specific limitation-on-claims period:

> California permits contracting parties to agree upon a shorter limitations period for bringing an action than that prescribed by statute, so long as the time allowed is reasonable. A contractual limitation period requiring a plaintiff to commence an action within 12 months following the event giving rise to a claim is a reasonable limitation which generally manifests no undue advantage and no unfairness.

Han v. Mobil Oil Corp., 73 F.3d 872, 877 (9th Cir.1995) (internal citations to California cases omitted).

Since Allstate and the Giakoumakises contracted for a "reasonable" limitations period under California law, any claim arising under that policy would be measured against the one-year time bar. As this Court held in the Houses' case, all of the Plaintiffs' claims – including the RICO claim – arise out of their respective policies of insurance. *See Campanelli,* 85 F.Supp.2d at 984. Accordingly, the Court must apply the one-year time bar to the RICO claim.

Preemption doctrine does not require a contrary conclusion. The Court acknowledges that the contractual limitations period is essentially a creature of state law, since § 2071 requires the inclusion of a one-year limitations period in every California homeowners' policy. Viewed as a state law provision, rather than a contractual provision, the one-year time-bar could, in theory, be preempted by federal RICO's four-year limitations period. In actuality, however, the preemption argument works

against the application of the four-year RICO limitations period.

Most federal laws that interfere with state regulation of insurance are superseded by operation of the federal McCarran-Ferguson Act. *See* 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance"). In effect, the McCarran-Ferguson Act provides for "reverse preemption," whereby state insurance laws trump inconsistent federal provisions.

The Supreme Court has considered McCarran-Ferguson reverse preemption in the RICO context:

> The McCarran-Ferguson Act [] precludes application of a federal statute in face of state law "enacted ... for the purpose of regulating the business of insurance," if the federal measure does not "specifically relat[e] to the business of insurance," and would "invalidate, impair, or supersede" the State's law. RICO is not a law that "specifically relates to the business of insurance." This case therefore turns on the question: Would RICO's application to the employee beneficiaries' claims at issue "invalidate, impair, or supersede" Nevada's laws regulating insurance?

Humana, Inc. v. Forsyth, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999) (internal cite omitted).

California law requires Allstate to provide a one-year claims limitation period in its insurance policies. Yet federal law establishes a four-year period for RICO claims.

State and federal law cannot be reconciled on this point. In the face of this inconsistency, *Humana* suggests that state law prevails.

Applying the four-year RICO time-bar in the Giakoumakises' case would result in the "invalidation" and "impairment" of California's mandatory one-year limitations period for suing an insurer under an insurance policy. California law requires the one-year limit to be placed in every homeowners' policy sold in California. California courts regularly apply the bar to prevent stale claims against insurers. California thus has a strong policy preferring the application of the one-year limit, rather than the four-year RICO limit. Consequently, the one-year time-bar in § 2071 preempts the RICO four-year statute of limitations.

DISPOSITION

The Court ***grants*** Allstate's motion for summary judgment against Plaintiffs George and Mary Lou Giakoumakis.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VITO CAMPANELLI; et al. Plaintiffs, v. ALLSTATE INSURANCE CO.; et al. Defendants.	Case No. CV 98-7185 RJK **ORDER GRANTING DEFENDANT ALLSTATE INSURANCE CO.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF CHERYL MONDHEIM** (Filed Feb. 8, 2000)

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiff Cheryl Mondheim ("Mondheim") on September 20, 1999.[1] The Court heard oral argument on October 25, 1999. Following argument, the Court took the matter under submission. Having considered the parties' briefs and declarations, and the contentions of counsel, the Court now *grants* Allstate's motion for summary judgment.

FACTUAL BACKGROUND

Mondheim is an Allstate policyholder. On January 17, 1994, the Northridge earthquake shook the Los Angeles area, damaging many buildings, homes, and structures, including Mondheim's home in Chatsworth, California.

[1] Mondheim is one of more than 25 Plaintiffs who filed suit against Allstate regarding its adjustment of property damage claims in the aftermath of the January 1994 Northridge earthquake.

Following the earthquake, on January 18, 1994, Mondheim submitted a claim for property damage to Allstate.

Allstate paid Mondheim $220,101.51 for her claim on November 18, 1994. Following an additional inspection, Allstate paid Mondheim another $32,241.87 for her claim of damages. Then on January 24, 1996, Mondheim demanded that Allstate reopen her claim to pay for the cost of cleaning her pool. Allstate agreed to pay Mondheim $1025.00 on February 14, 1996.

Allstate closed Mondheim's claim by letter dated February 22, 1996. The letter stated that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Declaration of Mary DiNapoli ¶ 10, Lodgment of Exhibits, Ex. 8 (September 20, 1999).

On September 2, 1998, Mondheim joined in the instant suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers employed by Allstate contractors were unlicensed in California. These contractors allegedly employed false stamps in adjusting the Plaintiffs' property damage claims. Plaintiffs further allege that Allstate knew, or perhaps encouraged, these fraudulent adjusting practices.

As a result, Plaintiffs contend that they settled their claims for less than they were worth.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

See Complaint ¶¶ 61-101 (September 2, 1998).

Allstate now moves for summary judgment against Mondheim, arguing that her claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assoc.,* 809 F.2d 626, 630 (9th Cir. 1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir. 1999). A court may not, on a motion for summary judgment, evaluate the

credibility of evidence. *See Leslie v. Grupo ICA,* 198 F.3d 1152, 1157-59 (9th Cir. 1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed. R. Civ. P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir. 1997), *quoting Anderson,* 477 U.S. at 249, 252. If the adverse party does not so respond,

summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. The One-Year Limitations Period

In California, homeowners' insurance policies must contain the following provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins. Code § 2071 (West 1993). The Allstate policy held by Mondheim included this one-year limitations provision.

The California Supreme Court has defined the phrase *inception of the loss* to mean "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Comm. Ins. v. Superior Court,* 51 Cal.3d 674, 686-87 (1990).

Allstate argues that Mondheim's "loss" occurred during the January 17, 1994 Northridge earthquake, yet she did not file this lawsuit until September 2, 1998. Thus, Allstate contends that her claims for relief are barred by the one-year statute of limitations.

Mondheim disputes that her loss occurred on January 17, 1994. She argues that the timing of her loss may not be resolved by summary judgment because that inquiry

presents a factual issue for trial. *See id.* at 687 ("[d]etermining when appreciable damage occurs such that a reasonable insured would be on notice of a potentially insured loss is a factual matter for the trier of fact."). But Mondheim cannot avoid summary judgment in this instance because she has failed to muster *any* factual dispute regarding the date of their loss. Put simply, Mondheim has not introduced any evidence to controvert Allstate's evidence that the damage occurred on January 17, 1994.

Aside from the arguments of counsel – which may *not* be considered as evidence of disputed facts sufficient to avoid summary judgment – Mondheim has produced only a half-page "Statement of Genuine Issues." This document nowhere controverts Allstate's evidence that Mondheim's loss occurred on January 17, 1994. Plaintiffs may not maintain silence in the face of an affirmative burden to display a genuine dispute of material fact pertaining to the inception of the loss. *See* Fed. R. Civ. P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Since Mondheim has failed to controvert Allstate's contention that her loss occurred January 17, 1994, the Court finds, for purposes of this motion, that the inception of the loss was January 17, 1994.

B. Tolling the One-Year Period During Allstate's Investigation

Although Mondheim's loss occurred in January 1994, the one-year time period did not expire in January 1995, because the limitations period was tolled while Allstate

investigated the claim. The California Supreme Court has loosened the otherwise strict operation of the one-year time bar to permit homeowners to toll the one-year period "from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." *Id.* at 693. By tolling the one-year limit while the insurance company investigates an insured's claim, the insured avoids a penalty if the insurer engages in a lengthy investigation. As a practical matter, the one-year period begins to run from the date the insurer denies coverage or settles the claim.

In the case of Mondheim, the one-year period was tolled until February 22, 1996. On that date, Allstate informed Mondheim in writing that her claim had been resolved, and thus closed. Consequently, Mondheim had to file suit before February 22, 1997 to avoid the one-year time bar. Plaintiffs' lawsuit was filed on September 2, 1998, more than one year *after* the limitations period had lapsed.

C. Actions Brought Outside the Policy Terms are Exempt from the One-Year Limitations Provision

Mondheim suggests that her claims are exempt from the operation of the one-year time bar because her claims are not based upon violations of the policy terms. She claims that Allstate's fraudulent conduct occurred *subsequent* to Allstate's handling of the property damage claim.

California courts have distinguished actions brought "on the policy" from those not. Actions brought "on the policy" – for example, bad faith claims against an insurer for its failure to pay benefits – fall within the ambit of the one-year limitations period in § 2071. *See Velasquez v.*

Truck Ins. Exch., 1 Cal. App. 4th 712, 719 (1991) (applying the statute of limitations strictly "where the bad faith action is based on allegations relating to the handling of a claim or the manner in which it is processed."). In two instances, however, California courts determined that actions against an insurer fell "outside" the policy, thus precluding the insurer from asserting the statute of limitations as a defense. *See Frazier v. Metropolitan Life Ins. Co.*, 169 Cal. App. 3d 90 (1985); *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38 (1978).

Mondheim attempts to fit her case within the narrow exceptions to the one-year statute of limitations carved out in *Frazier* and *Murphy*. But both cases are readily distinguishable.

In *Frazier*, a widow sued her husband's life insurance carrier for failure to pay certain death benefits resulting from the claim of an accidental death. The Court of Appeal affirmed the trial court's denial of the statute of limitations defense on the ground that the insurer had not yet completed its investigation into whether the insured's death was suicide. Since the investigation remained open, the limitations period remained tolled until the widow received word of an adverse decision upon which she could stake her bad faith claim.

> [A]s found by the trial judge, Mrs. Frazier's action does not commence until Metropolitan denies her claim on the ground of suicide. Prior to such time Mrs. Frazier has a right (so far as the policy limitation is concerned) to sit back and wait until denial of claim before urging bad faith. Because it is not until Metropolitan actually denies the claim on the ground of suicide that Mrs. Frazier can actually ascertain whether or not

> Metropolitan has acted in bad faith. So long as Metropolitan continues to tell Mrs. Frazier they are trying to uncover new evidence, they have not committed an ultimate act of bad faith, and Mrs. Frazier has a right to rely upon their assurances.

Frazier, 169 Cal. App. 3d at 103-104.

In contrast to *Frazier,* where the one-year limitations period remained tolled while the insurer completed its investigation, Mondheim received a letter from Allstate in February 1996 informing her that her claim was resolved. The letter indicated in no uncertain terms that she had one year from that date to file suit related to the handling of her property damage claim.

Murphy provides no better support for Mondheim's contentions. In *Murphy,* homeowners filed a claim with Allstate after suffering fire damage to their home and furniture. Allstate retained unlicensed contractors to fix the home and furniture. During the repair process, the contractors neglected to protect the home from the elements by leaving the roof exposed. In effect, the homeowners suffered a *second* loss because of the contractors' shoddy work. The Court of Appeal concluded that this second loss – caused by Allstate's contractors – was not covered under the homeowners' policy. *Murphy,* 83 Cal. App. 3d at 45-46.

Unlike the homeowners in *Murphy,* whose claims originated from a second loss subsequent to the initial loss that triggered insurance coverage, Mondheim suffered but a single loss. The Northridge earthquake damaged her home. She has not alleged that Allstate's contractors engaged in such shoddy workmanship that she incurred

additional losses beyond those caused by the earthquake. Rather, she merely alleges that Allstate deprived her (by hiring unlicensed contractors) of appropriate damages suffered during the Northridge earthquake.

This Court's narrow reading of *Frazier* and *Murphy* comports with the approach of later California courts. *See, e.g., CBS Broadcasting Inc. v. Fireman's Fund Ins. Co.,* 70 Cal. App. 4th 1075, 1086 (1999) (finding a "trend by the appellate courts to limit the exemption from the limitations clause set forth in *Murphy* and *Frazier* to the facts of those cases"). Another court in this District has suggested that *Frazier* and *Murphy* have been limited to their facts by later decisions. *See Bank of America Nat'l Trust & Savings Assoc. v. Allstate Ins. Co.,* 29 F. Supp. 2d 1129, 1133-34 (C.D. Cal. 1998) (Pregerson, J.). No California case has opined that the subtle distinctions crafted in *Frazier* and *Murphy* deserve expansion.

Mondheim's lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of her property damage claim. Accordingly, Mondheim's lawsuit is "on the policy," and therefore subject to the one-year time bar. Since Mondheim's suit was not filed until more than two years after her property damage claim was settled by Allstate, her suit is time-barred.

D. Abstention

As a last-gasp measure, Plaintiff urges this Court to abstain from deciding this motion until the California Supreme Court resolves a closely related inquiry. *See Vu v. Prudential Property & Casualty Ins. Co.,* 172 F.3d 725 (9th

Cir. 1999) (certifying a question of law to the California Supreme Court). In January 1994, Vu recovered damages caused by the Northridge earthquake under his Prudential policy. Vu's policy contained a one-year claims limitation provision. In September 1995, Vu discovered *additional* damages that the Prudential adjuster had failed to locate during his inspection. Those additional damages were appraised at more than ten times the deductible on the policy. Vu filed a claim, but Prudential refused to pay citing the one-year time bar. Vu then brought suit; he argued that Allstate [sic] should be estopped from benefitting from the time bar, since he had relied upon Prudential to discover the full extent of earthquake damages back in 1994.

The *Vu* court concluded that California appellate courts had authored conflicting opinions interpreting the "inception of the loss" provision. Accordingly, the Ninth Circuit certified the following question to the Supreme Court of California:

> Where an insured presents a timely claim to his insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of covered damage, does California Insurance Code § 2071 bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage? Or, to put the matter differently, does *Neff v. New York Life Ins. Co.*, 30 Cal. 2d 165, 180 P.2d 900 (1947), remain good law?

Vu, 172 F.3d at 727.

The California Supreme Court accepted the certified question. *See* Cal. S. Ct. Minutes (July 28, 1999), Case No.

S078271. The Supreme Court has not yet scheduled the matter for hearing.

This Court acknowledges that the California Supreme Court's eventual decision in *Vu* could touch upon the issue presented by Allstate's motion for summary judgment. Nevertheless, *Vu* appears distinguishable on the ground that the insured discovered additional damages at a later point in time following the initial adjustment and settlement. Mondheim does not allege later-discovered damages in her claims.

In any event – whether the *Vu* opinion would control the result or not – this Court is not prepared to wait upon the California Supreme Court. This Court has an obligation to decide the cases on its docket, resorting to abstention only in truly exceptional circumstances. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959). Unlike the Ninth Circuit, this Court cannot certify questions of law to a state authority. *See* Cal. App. R. 29.5 ("The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth."). Thus, despite the minimal risk that *Vu* will alter the landscape of jurisprudence in California, the Court must rule now.

DISPOSITION

The Court ***grants*** Allstate's motion for summary judgment with respect to the claims brought by Plaintiff Cheryl Mondheim.

IT IS SO ORDERED.

DATED: February 8, 2000. /s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District
Judge

85 F.Supp.2d 980

Vito CAMPANELLI, et al., Plaintiffs,

v.

ALLSTATE INS. CO., et al., Defendants

No. CV 98-7185 RJK.

United States District Court,
C.D. California

Feb. 7, 2000.

Norman J. Watkins, Ruth Segal, Lynberg & Watkins, Los Angeles, CA, for Plaintiffs.

Peter H. Klee, Nathan S. Arrington, Luce Forward Hamilton & Scripps, San Diego, CA, for Defendants.

ORDER GRANTING DEFENDANT ALLSTATE INS. CO.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS JAMES & PAT HOUSE

KELLEHER, District Judge.

Defendant Allstate Insurance Company ("Allstate") filed the instant motion for summary judgment against Plaintiffs James and Pat House (together, the "Houses") on August 24, 1999.[1] The Court heard oral argument on October 4, 1999. Following argument, the Court took the matter under submission. Having considered the parties' briefs and declarations, and the contentions of counsel, the

[1] The Houses are two of more than 25 Plaintiffs who filed suit against Allstate regarding its adjustment of property damage claims in the aftermath of the January 1994 Northridge earthquake.

Court now ***grants*** Defendants' motion for summary judgment.

FACTUAL BACKGROUND

The Houses are Allstate policyholders. On January 17, 1994, the Northridge earthquake shook the Los Angeles area, damaging many buildings, homes, and structures, including the Houses' home in Woodland Hills, California. Following the earthquake, on January 20, 1994, the Houses submitted a claim for property damage to Allstate.

Allstate paid the Houses $106,287.20 for their claims on June 10, 1994. Following an additional inspection, Allstate paid the Houses another $11,827.51 for their claim of damages.

Allstate closed the Houses' claims by letter dated October 12, 1995. The letter stated that any further damage claims had to be filed within one year of the letter's date.

> Both your Allstate policy and California law provide you up to one year to present and pursue a claim under your policy for damages to your home and its contents. Within this one year period you must take reasonable steps to identify any damage your home or its contents may have suffered in the earthquake, and promptly report the damage to us.

Declaration of Mary DiNapoli, Ex. 4 (August 19, 1999).

On September 2, 1998, the Houses joined in the instant suit against Allstate and Allstate's contractors alleging irregularities in the adjustment of claims following the earthquake. Plaintiffs allege that the engineers

employed by Allstate contractors were unlicensed in California. These contractors allegedly employed false stamps in adjusting the Plaintiffs' property damage claims. Plaintiffs further allege that Allstate knew, or perhaps encouraged, these fraudulent adjusting practices. As a result, Plaintiffs contend that they settled their claims for less than they were worth.

Plaintiffs specifically allege claims for:

(1) RICO violations, 18 U.S.C. §§ 1961-1968;

(2) Negligence;

(3) Negligent Misrepresentation;

(4) Intentional Misrepresentation;

(5) Breach of the Covenant of Good Faith and Fair Dealing; and

(6) Breach of Contract.

See Complaint ¶¶ 61-101 (September 2, 1998).

Allstate now moves for summary judgment against the Houses, arguing that their claims for relief are time-barred under the Allstate policy and California law.

STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material only if it is relevant to a claim or defense and its existence might affect the suit's outcome. *See T.W. Elec. Serv., Inc. v. Pacific Elec.*

Contractors Assoc., 809 F.2d 626, 630 (9th Cir.1987). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *See Chaffin v. United States,* 176 F.3d 1208, 1213 (9th Cir.1999). A court may not, on a motion for summary judgment, evaluate the credibility of evidence. *See Leslie v. Grupo ICA,* 198 F.3d 1152, 1157-59 (9th Cir.1999).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir.1990). To demonstrate that the non-moving party has no evidence, the moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence or by any other form of admissible evidence. *See Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *See id.* at 325, 106 S.Ct. 2548.

A non-moving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). "[A] mere 'scintilla' of evidence will be insufficient to defeat a

properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Fazio v. City and County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir.1997), *quoting Anderson,* 477 U.S. at 249, 252, 106 S.Ct. 2505. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

DISCUSSION

A. The One-Year Limitations Period

In California, homeowners' insurance policies must contain the following provision:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal.Ins.Code § 2071 (West 1993). The Allstate policy held by the Houses included this one-year limitations provision.

The California Supreme Court has defined the phrase *inception of the loss* to mean "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Comm. Ins. v. Superior Court,* 51 Cal.3d 674, 686-87, 274 Cal.Rptr. 387, 798 P.2d 1230 (1990).

Allstate argues that the Houses' "loss" occurred during the January 17, 1994 Northridge earthquake, yet the

Houses did not file this lawsuit until September 2, 1998. Thus, Allstate contends that the Houses' claims for relief are barred by the one-year statute of limitations.

The Houses dispute that their loss occurred on January 17, 1994. The Houses argue that the timing of their loss may not be resolved by summary judgment because that inquiry presents a factual issue for trial. *See id.* at 687, 274 Cal.Rptr. 387, 798 P.2d 1230 ("[d]etermining when appreciable damage occurs such that a reasonable insured would be on notice of a potentially insured loss is a factual matter for the trier of fact."). But the Houses cannot avoid summary judgment in this instance because they have failed to muster *any* factual dispute regarding the date of their loss. Put simply, the Houses have not introduced any evidence to controvert Allstate's evidence that the damage occurred on January 17, 1994.

Aside from the arguments of counsel – which may *not* be considered as evidence of disputed facts sufficient to avoid summary judgment – the Houses have produced only a half-page "Statement of Genuine Issues." This document nowhere controverts Allstate's evidence that the Houses' loss occurred on January 17, 1994. Plaintiffs may not maintain silence in the face of an affirmative burden to display a genuine dispute of material fact pertaining to the inception of the loss. *See* Fed.R.Civ.P. 56(e) (non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Since the Houses have failed to controvert Allstate's contention that their loss occurred January 17, 1994, the Court finds, for purposes of this motion, that the inception of the loss was January 17, 1994.

B. Tolling the One-Year Period During Allstate's Investigation

Although the Houses' loss occurred in January 1994, the one-year time period did not expire in January 1995, because the limitations period was tolled while Allstate investigated the claim. The California Supreme Court has loosened the otherwise strict operation of the one-year time bar to permit homeowners to toll the one-year period "from the time an insured gives notice of the damage to his insurer, pursuant to applicable policy notice provisions, until coverage is denied." *Id.* at 693, 274 Cal.Rptr. 387, 798 P.2d 1230. By tolling the one-year limit while the insurance company investigates an insured's claim, the insured avoids a penalty if the insurer engages in a lengthy investigation. As a practical matter, the one-year period begins to run from the date the insurer denies coverage or settles the claim.

In the case of the Houses, the one-year period was tolled until October 12, 1995. On that date, Allstate informed the Houses in writing that their claim had been resolved, and thus closed. Consequently, the Houses had to file suit before October 12, 1996 to avoid the one-year time bar. Plaintiffs' lawsuit was filed on September 2, 1998, almost two years *after* the one-year limitations period had lapsed.

C. Actions Brought Outside the Policy Terms are Exempt from the One-Year Limitations Provision

The Houses suggest that their claims are exempt from the operation of the one-year time bar because their claims are not based upon violations of the policy terms. The Houses claim that Allstate's fraudulent conduct occurred

subsequent to Allstate's handling of the property damage claim.

California courts have distinguished actions brought "on the policy" from those not. Actions brought "on the policy" – for example, bad faith claims against an insurer for its failure to pay benefits – fall within the ambit of the one-year limitations period in § 2071. *See Velasquez v. Truck Ins. Exch.,* 1 Cal.App.4th 712, 719, 5 Cal.Rptr.2d 1 (1991) (applying the statute of limitations strictly "where the bad faith action is based on allegations relating to the handling of a claim or the manner in which it is processed."). In two instances, however, California courts determined that actions against an insurer fell "outside" the policy, thus precluding the insurer from asserting the statute of limitations as a defense. *See Frazier v. Metropolitan Life Ins. Co.,* 169 Cal.App.3d 90, 214 Cal.Rptr. 883 (1985); *Murphy v. Allstate Ins. Co.,* 83 Cal.App.3d 38, 147 Cal.Rptr. 565 (1978).

The Houses attempt to fit their case within the narrow exceptions to the one-year statute of limitations carved out in *Frazier* and *Murphy.* But both cases are readily distinguishable.

In *Frazier,* a widow sued her husband's life insurance carrier for failure to pay certain death benefits resulting from the claim of an accidental death. The Court of Appeal affirmed the trial court's denial of the statute of limitations defense on the ground that the insurer had not yet completed its investigation into whether the insured's death was suicide. Since the investigation remained open, the limitations period remained tolled until the widow received word of an adverse decision upon which she could stake her bad faith claim.

> [A]s found by the trial judge, Mrs. Frazier's action does not commence until Metropolitan denies her claim on the ground of suicide. Prior to such time Mrs. Frazier has a right (so far as the policy limitation is concerned) to sit back and wait until denial of claim before urging bad faith. Because it is not until Metropolitan actually denies the claim on the ground of suicide that Mrs. Frazier can actually ascertain whether or not Metropolitan has acted in bad faith. So long as Metropolitan continues to tell Mrs. Frazier they are trying to uncover new evidence, they have not committed an ultimate act of bad faith, and Mrs. Frazier has a right to rely upon their assurances.

Frazier, 169 Cal.App.3d at 103-104, 214 Cal.Rptr. 883.

In contrast to *Frazier,* where the one-year limitations period remained tolled while the insurer completed its investigation, the Houses received a letter from Allstate in October 1995 informing them that their claim was resolved. The letter indicated in no uncertain terms that the Houses had one year from that date to file suit related to the handling of the property damage claim.

Murphy provides no better support for Plaintiffs' contentions. In *Murphy,* homeowners filed a claim with Allstate after suffering fire damage to their home and furniture. Allstate retained unlicensed contractors to fix the home and furniture. During the repair process, the contractors neglected to protect the home from the elements by leaving the roof exposed. In effect, the homeowners suffered a *second* loss because of the contractors' shoddy work. The Court of Appeal concluded that this second loss – caused by Allstate's contractors – was not

covered under the homeowners' policy. *Murphy,* 83 Cal.App.3d at 45-46, 147 Cal.Rptr. 565.

Unlike the homeowners in *Murphy,* whose claims originated from a second loss subsequent to the initial loss that triggered insurance coverage, the Houses suffered but a single loss. The Northridge earthquake damaged the Houses' home. The Houses have not alleged that Allstate's contractors engaged in such shoddy workmanship that the Houses incurred additional losses beyond those caused by the earthquake. The Houses merely allege that Allstate deprived them (by hiring unlicensed contractors) of appropriate damages suffered during the Northridge earthquake.

This Court's narrow reading of *Frazier* and *Murphy* comports with the approach of later California courts. *See, e.g., CBS Broadcasting Inc. v. Fireman's Fund Ins. Co.,* 70 Cal.App.4th 1075, 1086, 83 Cal.Rptr.2d 197 (1999) (finding a "trend by the appellate courts to limit the exemption from the limitations clause set forth in *Murphy* and *Frazier* to the facts of those cases"). Another court in this District has suggested that *Frazier* and *Murphy* have been limited to their facts by later decisions. *See Bank of America Nat'l Trust & Savings Assoc. v. Allstate Ins. Co.,* 29 F.Supp.2d 1129, 1133-34 (C.D.Cal.1998) (Pregerson, J.). No California case has opined that the subtle distinctions crafted in *Frazier* and *Murphy* deserve expansion.

The Houses' lawsuit for bad faith, tortious conduct, and breach of contract emanates from the policy itself. The lawsuit seeks redress for damages caused by Allstate's conduct during the adjustment of the Houses' property damage claim. Accordingly, the Houses' action is "on the policy," and therefore subject to the one-year time bar.

Since the Houses' suit was not filed until more than two years after their property damage claim was settled by Allstate, the Houses' suit is time-barred.

D. Abstention

As a last-gasp measure, the Plaintiffs urge this Court to abstain from deciding this motion until the California Supreme Court resolves a closely related inquiry. *See Vu v. Prudential Property & Casualty Ins. Co.,* 172 F.3d 725 (9th Cir.1999) (certifying a question of law to the California Supreme Court). In January 1994, Vu recovered damages caused by the Northridge earthquake under his Prudential policy. Vu's policy contained a one-year claims limitation provision. In September 1995, Vu discovered *additional* damages that the Prudential adjuster had failed to locate during his inspection. Those additional damages were appraised at more than ten times the deductible on the policy. Vu filed a claim, but Prudential refused to pay citing the one-year time bar. Vu then brought suit; he argued that Allstate [sic] should be estopped from benefitting from the time bar, since he had relied upon Prudential to discover the full extent of earthquake damages back in 1994.

The *Vu* court concluded that California appellate courts had authored conflicting opinions interpreting the "inception of the loss" provision. Accordingly, the Ninth Circuit certified the following question to the Supreme Court of California:

> Where an insured presents a timely claim to his insurer for property damage under a policy, and the insurer's agent inspects the property but does not discover the full extent of covered

> damage, does California Insurance Code § 2071 bar a claim brought by the insured more than one year after the damage was sustained but within one year of his discovery of the additional damage? Or, to put the matter differently, does *Neff v. New York Life Ins. Co.*, 30 Cal.2d 165, 180 P.2d 900 (1947), remain good law?

Vu, 172 F.3d at 727.

The California Supreme Court accepted the certified question. *See* Cal. S.Ct. Minutes (July 28, 1999), Case No. S078271. The Supreme Court has not yet scheduled the matter for hearing.

This Court acknowledges that the California Supreme Court's eventual decision in *Vu* could touch upon the issue presented by Allstate's motion for summary judgment. Nevertheless, *Vu* appears distinguishable on the ground that the insured discovered additional damages at a later point in time following the initial adjustment and settlement. The Houses do not allege later-discovered damages in their claims.

In any event – whether the *Vu* opinion would control the result or not – this Court is not prepared to wait upon the California Supreme Court. This Court has an obligation to decide the cases on its docket, resorting to abstention only in truly exceptional circumstances. *See Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959). Unlike the Ninth Circuit, this Court cannot certify questions of law to a state authority. *See* Cal.App. R. 29.5 ("The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any

state, territory, or commonwealth."). Thus, despite the minimal risk that *Vu* will alter the landscape of jurisprudence in California, the Court must rule now.

DISPOSITION

The Court *grants* Allstate's motion for summary judgment with respect to the claims brought by Plaintiffs James and Pat House.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

JAMES HOUSE; PAT HOUSE,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-55466

DC No. CV 98-7185 RJK

ORDER

(Filed Jun. 2, 2003)

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; JAMES HOUSE; PAT HOUSE; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

CHERYL MONDHEIM,

Plaintiff-Appellant,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-55468

DC No.
CV 98-7185 RJK

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; JAMES HOUSE; PAT HOUSE; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; WILLIAM NOAH, TERRY NOAH; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER; DONALD HUBER; LORRAINE ROSENBLATT,

Plaintiffs,

and,

GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee.

No. 00-55957

DC No. CV 98-7185 RJK

VITO CAMPANELLI; PEGGY CAMPANELLI; JOHN CAUDILLO; BARBARA CAUDILLO; NEIL DAMROW; GAYLE DAMROW; NANCY DURRANT; GARFIELD ECUNG; DEBRA ECUNG; GEORGE GIAKOUMAKIS; MARY LOU GIAKOUMAKIS; JAMES HOUSE; PAT HOUSE; DONALD HUNER; TOMMIE JENKINS; CARRIE JENKINS; BRENDA KALOSH; DONALD MENCK; FLORENCE MENCK; CHERYL MONDHEIM; ROY ROSENBLATT, LORRAINE ROSENBLATT; DARLA SEVERN; LOYAL SMITH; MILDRED STAFFORD; MARILYN TABER,

Plaintiffs,

and,

WILLIAM NOAH; TERRY NOAH,

Plaintiffs-Appellants,

v.

ALLSTATE LIFE INSURANCE COMPANY, an Illinois Corporation,

Defendant-Appellee,

and

SHADOWBROOK DESIGN GROUP, INC., a California Corporation; W.S.C., a California Corporation, dba Western States Construction, dba Western States Geotechnical, aka Western States Companies,

Defendants.

No. 00-57080

DC No.
CV 98-7185 RJK

Before: BRIGHT*, GOODWIN, and TASHIMA, Circuit Judges.

The petition for panel rehearing is denied.

* Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

§340.9. Insurance Claim for Damages Arising Out of Northridge Earthquake of 1994; Revival of Cause of Action.

(a) Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section. This subdivision shall only apply to cases in which an insured contacted an insurer or an insurer's representative prior to January 1, 2000, regarding potential Northridge earthquake damage.

(b) Any action pursuant to this section commenced prior to, or within one year from, the effective date of this section shall not be barred based upon this limitations period.

(c) Nothing in this section shall be construed to alter the applicable limitations period of an action that is not time barred as of the effective date of this section.

(d) This section shall not apply to either of the following:

(1) Any claim that has been litigated to finality in any court of competent jurisdiction prior to the effective date of this section.

(2) Any written compromised settlement agreement which has been made between an insurer and its insured where the insured was represented by counsel admitted to the practice of law in California at the time of the settlement, and who signed the agreement. **Leg.H.** 2000 ch. 1090.

Supreme Court, U.S.
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No. 03-341

IN THE

Supreme Court of the United States

ALLSTATE INSURANCE CO.,

Petitioner,

v.

WILLIAM NOAH, TERRY NOAH, GEORGE GIAKOUMAKIS, MARY LOU GIAKOUMAKIS, CHERYL MONDHEIM, JAMES HOUSE and PAT HOUSE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 12, 2003

QUESTION PRESENTED

Did legislation that narrowly extended a statutorily-created one-year limitation on the filing of lawsuits to benefit plaintiffs who were victims of fraud by their insurance companies violate the Contract Clause of the United States Constitution?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Factual Background 1

2. Procedural Background 3

REASONS FOR DENYING THE WRIT 5

I. REVIEW SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS INTERLOCUTORY. 7

II. THE ONE-YEAR LIMITATIONS PERIOD WAS SET BY STATUTE, NOT CONTRACT, AND THUS THE CALIFORNIA LEGISLATURE'S EXTENSION OF THAT TIME PERIOD DOES NOT IMPLICATE THE CONTRACT CLAUSE. 8

III. EVEN IF SECTION 340.9 ALTERED A CONTRACTUAL RIGHT, THE ALTERATION DID NOT CONSTITUTE A "SUBSTANTIAL IMPAIRMENT" OF A CONTRACTUAL RELATIONSHIP. 10

IV. THE CIRCUITS ARE NOT SPLIT REGARDING THE DEGREE OF DEFERENCE GIVEN TO STATE LEGISLATURES' JUSTIFICATIONS FOR SUBSTANTIALLY IMPAIRING CONTRACTS. 14

CONCLUSION 18

TABLE OF AUTHORITIES

CASES **Pages**

20th Century Ins. Co. v. Superior Court,
90 Cal.App.4th 1247 (2001), *cert. denied*,
535 U.S. 1033 (2002) 2, 6, 9

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 16

American Construction Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372 (1893) 7

Bialo v. Western Mutual,
95 Cal.App.4th 68 (2002) 6, 9

Calfarm Ins. Co. v. Deukmejian,
771 P.2d 1247 (1989) 4, 12

Campbell v. Holt, 115 U.S. 620 (1885) 10

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 10, 12, 16, 17

Garris v. Hanover Ins. Co.,
630 F.2d 1001 (4th Cir. 1980) 15

General Motors Corp. v. Romein,
503 U.S. 181 (1992) 9

Hamilton-Brown Shoe Co. v. Wolf Bros. Co.,
240 U.S. 251 (1916) 7

Hellinger v. Farmers Ins.,
91 Cal.App.4th 1049 (2001) 6

Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete,
125 F.3d 9 (1st Cir. 1997) 13, 15

Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Public Welfare, 742 F.2d 442
(8th Cir. 1984) 15

National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451 (1985) 9

Nieves v. Hess Oil Virgin Islands Corp.,
819 F.2d 1237 (3d Cir. 1987) 9, 15

Prudential -LMI Com. Ins. v. Superior Court,
798 P.2d 1230 (1990) 2

Sal Tinnerello & Sons v. Town of Stonington,
141 F.3d 46 (2d Cir. 1998) 15

Veix v. Sixth Ward Bldg. & Loan Ass'n,
310 U.S. 32 (1940) 12

Vu v. Prudential Property & Casualty In. Co.,
33 P.3d 487 (2001) 5, 17

STATUTES AND FEDERAL RULES

California Code of Civil Procedure § 340.9 .... *passim*

California Insurance Code § 2071 ..... *passim*

OTHER

Robert L. Stern, et al., Supreme Court Practice (8th ed. 2002) 7

STATEMENT OF THE CASE

1. Factual Background

On January 17, 1994, homes owned by respondents William and Terry Noah, George and Mary Lou Giakoumakis, Cheryl Mondheim, and James and Patricia House ("Homeowners") were damaged by the Northridge Earthquake. Pet. App. 4. Over the next two years, the Homeowners filed claims with their insurer, petitioner Allstate, which assessed the earthquake damage to their homes. *Id.* 5. However, in May 1998, the Homeowners learned that the "engineering" reports that Allstate provided them during the claims adjustment process were not what they claimed to be. Although those reports purportedly contained an engineer's opinion of the earthquake damage after the engineer's personal inspection of the home, in fact no engineer had personally inspected the homes nor had any engineer drafted the "engineering" reports. *Id.* In addition, the reports were inaccurate and underestimated the damage and methods of repair. Consequently, the Homeowners had not been reimbursed by Allstate for the full amount of their damages. *Id.*

All of the insurance policies at issue were drafted in accordance with California Insurance Code § 2071, which establishes a standard insurance contract for all insurance policies that include coverage for fire damage. *See* Pet. App. 6-7. Under that statute, many of the contract terms are mandated by law and thus are not bargained-for provisions of the contract and cannot be altered by the

parties. One such mandatory element is the limitations period within which an insured can file a suit against the insurer. The statute requires that every insurance policy include the following statement:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss.

Cal. Ins. Code § 2071. The one-year limitations period begins running when the insured becomes aware of appreciable damage, is tolled after the insured files a claim, and begins to run again after the insurer notifies the insured that the claim has been closed. *Prudential-LMI Com. Ins. v. Superior Court,* 798 P.2d 1230, 1242 (1990).

The California legislature, after extensive hearings, determined that significant numbers of earthquake victims had not been treated fairly by their respective insurers in the months and years following the Northridge earthquake. *See 20th Century Ins. Co. v. Superior Court*, 90 Cal.App.4th 1247, 1266-68 (2001) (discussing legislative history of California Insurance Code § 340.9), *cert. denied*, 535 U.S. 1033 (2002). To address that problem, the legislature enacted California Code of Civil Procedure § 340.9, which revives insurance claims for damages arising out of the Northridge earthquake that were barred

"solely because the applicable statute of limitations has or had expired." The statute provides in relevant part:

> Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section [January 1, 2001] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced within one year of the effective date of this section.

Section 340.9 is restricted in several respects: It applies only to cases in which the insured contacted the insurer prior to January 1, 2000, regarding potential Northridge earthquake damage, § 340.9(a), and it provides that insureds must bring new claims within a single year (that is, between January 1, 2001 and January 1, 2002). § 340.9(b). Section 340.9 does not target particular individuals or insurers, but rather applies to all homeowners, regardless of the details of their situation or the identity of their insurer. In short, § 340.9 allows access to the judicial process for a limited period so that courts may determine who was, and who was not, treated fairly.

2. Procedural Background

On September 2, 1998, the Homeowners filed suit against Allstate, alleging negligent misrepresentation, intentional misrepresentation, breach of the covenant of good faith and fair dealing, and breach of contract. Pet. App. 5. Allstate filed motions for summary judgment against the Homeowners, arguing that all their claims were barred by the one-year limitations period in the insurance contracts. *Id.* The district court granted summary judgment against all the Homeowners.

The Ninth Circuit reversed, holding that § 340.9 revived the Homeowners' claims otherwise barred by the time limit set by California Insurance Code § 2071. Pet. App. 15. The court rejected Allstate's contention that § 340.9 violates the Contract Clause. Although the court held that § 340.9 substantially impaired the contracts between Allstate and the Homeowners, it concluded that the "severity of the impairment is significantly mitigated [] by the fact that the California insurance industry is heavily regulated." *Id.* 17 (citing *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1262 (1989)). In addition, the court reasoned that § 340.9 was less severe an impairment than it would have been had the original one-year limit been "bargained for," rather than mandated by the California Insurance Code. *Id.* 18. Furthermore, the court noted that § 340.9 is limited in scope, reviving the claims of only those plaintiffs who had contacted their insured prior to January 1, 2001, and who then filed suit within the specified one-year period. *Id.* 19-20.

Turning to the legislature's justification for altering the limitations period, the court found that the statute was enacted to accomplish the "legitimate public purpose" of "'bring[ing] needed relief to the victims of the Northridge earthquake'" who had been misled about the extent of their losses by their insurers. Pet. App. 18 (quoting Sen. Comm. on Judiciary, Analysis of Sen. Bill. No. 1899 (1999-2000)). The court rejected Allstate's contention that the California Supreme Court's recent decision in *Vu v. Prudential Property & Casualty In. Co.*, 33 P.3d 487 (2001), which permitted the filing of claims beyond one year upon a showing of misrepresentation, obviated the legislature's legitimate purpose for enacting § 340.9, explaining that § 340.9 provides broader relief than is available under *Vu*. Pet. App. 19.

REASONS FOR DENYING THE WRIT

As a threshold matter, certiorari should be denied because the Ninth Circuit's decision is interlocutory, and because this is not the rare case in which interlocutory review is justified by other compelling factors. In any case, the Contract Clause issue on which Allstate seeks review is not squarely presented because the California statute at issue did not abrogate a bargained-for contract term, but rather altered a time period set by *another statute*. This case therefore does not implicate the Contract Clause.

Even if this case squarely presented the question stated in the petition, it would not be worthy of review.

Allstate has not alleged that there is any division in the circuits regarding the application of the Contract Clause, nor has Allstate demonstrated that the Ninth Circuit failed to follow this Court's Contract Clause precedent. Moreover, this Court just recently denied certiorari on a previous petition filed by amicus curiae 21st Century Insurance Company (previously 20th Century) raising this exact same issue, *20th Century Ins. Co. v. Superior Court,* 90 Cal.App.4th 1247 (2001), *cert. denied* 535 U.S. 1033 (2002)), a fact that Allstate fails to mention in its petition.

In contrast, amicus 21st Century asserts that there is confusion in the circuit courts regarding the degree of deference to be given a legislature's justification for abrogating contract terms and claims that the Ninth Circuit gave more deference than this Court's precedent permits. However, none of the cases cited by 21st Century acknowledge any division in the circuits on this issue, and a close examination of those cases demonstrates that every circuit court is applying the standards enunciated by this Court. Moreover, the Ninth Circuit's conclusion is in accord with the three decisions issued by the California state courts on this very same issue. *See 20th Century*, 90 Cal.App.4th 1247 (2001); *Hellinger v. Farmers Ins.*, 91 Cal.App.4th 1049 (2001); *Bialo v. Western Mutual*, 95 Cal.App.4th 68 (2002). In short, there is no disagreement among the courts of appeals regarding the standards for applying the Contract Clause generally, or among the courts that have addressed the specific question whether the legislation challenged here is constitutional.

I. REVIEW SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS INTERLOCUTORY.

This Court should deny review because the decision below is interlocutory. The district court granted summary judgment against the Homeowners on the ground that all of their claims are barred by the one-year limitations period. The Ninth Circuit reversed and remanded for a determination on the merits of the Homeowners' claims. Thus, there has been no trial, let alone a final decision in the litigation.

Although this Court has jurisdiction under 28 U.S.C. § 1254(1) to review interlocutory decisions of federal courts of appeals, it rarely does so and this case is not the unusual case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., Supreme Court Practice § 4.18, at 258 (8th ed. 2002) (quoting *American Construction Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases"). The posture of this case is anything but "extraordinary." The Homeowners filed a complaint in district court alleging

breach of contract and other tort claims based on Allstate's conduct regarding their efforts to collect on their insurance polices. Allstate retains all defenses it may have aside from its contention that the claims are time-barred, and it may well prevail before the district court on the merits of the Homeowners' claims. If Allstate is successful, no further review would be necessary. Of course, the Homeowners believe that their cases are meritorious and that they will prevail in district court. In that case, there will be a final judgment from which Allstate may appeal and raise the Contract Clause issue at that time.

II. THE ONE-YEAR LIMITATIONS PERIOD WAS SET BY STATUTE, NOT CONTRACT, AND THUS THE CALIFORNIA LEGISLATURE'S EXTENSION OF THAT TIME PERIOD DOES NOT IMPLICATE THE CONTRACT CLAUSE.

Allstate asks this Court to determine whether it is "consistent with the Contract Clause of the United States Constitution for the California legislature to deprive all insurers of their *contractual right* to be free of time-barred claims . . . ." Pet. i (emphasis added). Allstate's question presented mistakenly presumes that insurers negotiated a contract guaranteeing the right to be free of claims after the one-year limitation period expires. However, that one-year time limit was not a bargained-for contract term but rather was a time limit set by statute. If certiorari were granted in this case, the Homeowners would argue that the challenged legislation did not impinge on a contractual

right, but rather simply extended a previously existing statute of limitations. *Cf. General Motors Corp. v. Romein*, 503 U.S. 181, 186-191 (1992) (declining to reach question whether a contract was "substantially impaired" after concluding that challenged legislation altered statutory requirement, not contract term). Thus, this case does not present the question whether the legislature's extension of that time period substantially impaired a "contractual right" in violation of the Contract Clause.

Parties challenging legislation under the Contract Clause "bear the burden of demonstrating that they in fact possess contractual rights or obligations altered by the law." *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir. 1987) (citing *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 472 (1985)). Allstate cannot make this showing. Before § 340.9 was enacted into law, California Insurance Code § 2071 required that insureds bring claims within one year of the inception of the loss. As the California Court of Appeal stated in a case raising the identical issue, the "'contractual' limitation period in [the insurer's] policy is mandated by statute (Ins. Code § 2071). It is therefore properly treated as a *statute* of limitations which does *not*, upon its expiration, endow in the defendant a 'vested right.'" *20th Century Ins. Co. v. Superior Court,* 90 Cal.App.4th 1247, 1272 (2001) (emphasis in original), *cert. denied,* 535 U.S. 1033 (2002); *accord Bialo*, 95 Cal.App.4th at 81 ("We reject . . . amici's claim that because the Legislature enacted the one-year notification period by requiring its insertion in the policy

rather than by enacting an express limitation period, it somehow is not a limitations period."); *see also Campbell v. Holt*, 115 U.S. 620, 623 (1885) (legislature's expansion of statute of limitations did not violate the Contract Clause). Although the Ninth Circuit below analyzed the legislation as if it abrogated a negotiated contract term, it also recognized that this limitations period was "not bargained for" by Allstate or the Homeowners, but rather was "subject to an existing statute." Pet. App. 18. In sum, because § 340.9 altered a statutory requirement, not a contract term, it does not raise the Contract Clause concerns that Allstate asks this Court to address.

III. EVEN IF SECTION 340.9 ALTERED A CONTRACTUAL RIGHT, THE ALTERATION DID NOT CONSTITUTE A "SUBSTANTIAL IMPAIRMENT" OF A CONTRACTUAL RELATIONSHIP.

Even if § 340.9's alteration of the limitations period in § 2071 is considered an alteration of a "contract," § 340.9 did not "substantially impair" a contractual relationship. Whenever legislation is challenged under the Contract Clause, the court must ask two questions. First, the court considers whether the relevant enactment constitutes a "substantial impairment" of a contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Only if that question is answered in the affirmative does the court consider the second question: whether the impairment is justified given the need for, and reasonableness of, the

enactment, according due deference to the legislature's judgment on these questions. *Id.* at 411-412. In this case, as we demonstrate below, section 340.9 does not impose a "substantial impairment" because 1) the alteration in the limitations period has only a minor effect on insurance contracts; and 2) the insurance industry is heavily regulated in California and the original limitations period in § 2071 was itself a creature of government regulation, making it less likely that § 340.9 disrupted settled expectations. Therefore, there would be no need to reach the question whether such an impairment was justified, which is the only issue on which a split in appellate authority is asserted.[1]

1. Although section 340.9 extends the existing one-year statute of limitations, that extension is very limited in scope: It applies only to cases in which the insured contacted the insurer prior to January 1, 2000, regarding

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[1] Petitioner does not assert that the courts of appeals are split on any issue raised in its petition. However, amicus 21st Century Insurance Company claims that the courts of appeals have applied "inconsistent" levels of deference to state legislative judgments justifying impairment of contracts. Amicus Br. 8. As explained in Part IV, *infra*, there is no split in the courts of appeals regarding application of the Contract Clause, and every case cited by 21st Century as demonstrating the alleged division applied the same legal standard as the Ninth Circuit when reviewing legislation challenged under the Contract Clause.

potential Northridge earthquake damage, § 340.9(a), and it provides that insureds must bring new claims within a single year, § 340.9(b).

Although Allstate contends that the "impairment of the contract is absolute for each affected contract," Pet. 9, in fact, the contract remains almost completely unchanged. Insurers are not held liable for types or amounts of damage for which they did not originally agree to pay. Nor are insurers required to pay for damage that occurred during a period in which they did not agree to cover the insured. The only change is one affecting the limitations period within which insured can sue the insurer under the contract, and that period is only narrowly extended.

2. In "determining the extent of the impairment, [courts] are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves*, 459 U.S. at 411. If the contract involves a heavily-regulated industry, such as the insurance industry in California, where the rights and obligations of the contracting parties are known in advance to be subject to change based on social, economic, and political needs, then legislation affecting that contract is less likely to disrupt settled expectations. *See Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1262 (1989) ("Insurance []is a highly regulated industry, and one in which further regulation can reasonably be anticipated."). In such circumstances, the challenged legislation will less likely be considered a substantial impairment of a contract. *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38

(1940) (noting that when one "purchase[s] into an enterprise already regulated in the particular to which he now objects, he purchase[s] subject to further legislation upon the same topic.").

Although petitioner does not deny that the insurance industry in California is heavily regulated, it argues that "the proper question is not whether the industry was regulated generally, but whether it was regulated in the particular respect at issue." Pet. 13 (internal quotation marks omitted). Petitioner next contends that "there is no evidence that insurers have been subject to regulation of the contractual limitations provision." *Id.* 14. Petitioner is incorrect. The contractual limitations period affected by section 340.9 was originally set by *another* statute — § 2071. That the original one-year limitations period was itself the product of government regulation is not just "evidence," it is concrete proof that insurers "have been subject to regulation of the contractual limitations provision." *See, e.g., Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete*, 125 F.3d 9, 14 (1st Cir. 1997) ("Just as the legislature created [a government insurance agency] because of an insurance crisis, it was reasonable to expect that the legislature could terminate [that agency's] existence in the event that [the agency] did not fulfill its purposes, or a new crisis ensued.").

IV. THE CIRCUITS ARE NOT SPLIT REGARDING THE DEGREE OF DEFERENCE GIVEN TO STATE LEGISLATURES' JUSTIFICATIONS FOR SUBSTANTIALLY IMPAIRING CONTRACTS.

Amicus 21st Century Insurance Company asks this Court to grant the petition to resolve alleged confusion in the lower courts regarding the degree of deference to give legislatures in justifying legislation that substantially impairs contractual rights. As explained above, this Court should not reach this issue because 1) the decision below is not final; 2) the legislation at issue here did not affect a "contractual right"; and 3) even if the one-year limit on filing lawsuits had been a "contractual right," the minor extension of that period did not "substantially impair" insurers' contracts. However, even if the issue were squarely presented, it would not be worthy of this Court's review.

Amicus argues that the circuit courts apply "inconsistent levels of deference to state legislative judgments." Amicus Br. 8. According to the amicus, the Courts of Appeals for the First, Second, Third, Fourth and Eighth Circuits conduct an appropriately rigorous review to determine whether challenged state legislation is "drafted reasonably to remedy the stated public purpose," while the Ninth and Eleventh Circuits "in the name of deference, have abdicated completely" their obligation to

review the legislature's justifications for such legislation. Amicus Br. 8. The alleged circuit split is illusory.

The cases cited by amicus do not support its contention that the appellate courts apply different degrees of deference to a legislature's views regarding the necessity for legislation altering contract terms. In *every* decision cited by amicus 21st Century, the court explicitly stated that it must give deference to the legislative judgment regarding the necessity and reasonableness of the legislation at issue. *See Mercado-Boneta*, 125 F.3d at 16 ("We thus accord considerable deference to the Commonwealth's assessment of the reasonableness and necessity of Act No. 4."); *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 54 (2d Cir. 1998) ("We must accord substantial deference to the Town's conclusion that its approach reasonably promotes the public purposes for which the ordinance was enacted."); *Nieves*, 819 F.2d at 1249 ("[W]e will apply the deferential standard of review to make the requisite overall determination of reasonableness.") (internal quotation marks omitted); *Garris v. Hanover Insurance Co.*, 630 F.2d 1001, 1009 n.6 (4th Cir. 1980) ("In making an independent constitutional judgment, we of course owe proper deference to the prior legislative judgment in enacting the challenged provision . . . ."); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Public Welfare,* 742 F.2d 442, 450 (8th Cir. 1984) ("Deference is given to the legislative judgment concerning the necessity and reasonableness of economic and social regulation which affects private contracts.").

These courts, like the Ninth Circuit here, adhered to *Energy Reserves*, 459 U.S. at 412-13, in which the Court stated that "courts [should] properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *See also id.* at 417 n.25 ("[P]rovided 'legislature is functioning properly, selection of a public purpose and determination of necessity and appropriateness should be left to it.'") (quoting Note, 89 Yale L.J. at 1645); *id.* at 418 ("Nor are the means chosen to implement these purposes deficient, particularly in light of the deference to which the Kansas Legislature's judgment is entitled."). Deference to legislative judgments is the standard consistently applied by this Court and every circuit court when determining whether legislation impairing contract terms is reasonable and necessary.

Although here the Ninth Circuit panel properly gave some deference to the legislature's reasoning — as it is required to do by *Energy Reserves* — the panel did not "abdicate" its duty under the Contract Clause to scrutinize the justification for the legislation. First, the court noted that the impairment was minimized by the heavy regulation of the insurance industry in general, by the previous legislation concerning the time limit for filing claims in particular, and by the legislation's limited application. Pet. App. 16-19. Because these factors reduced the degree of impairment, the standard for judging its necessity is similarly relaxed. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Next, the court found that § 340.9 was enacted to accomplish a legitimate public purpose — protecting the victims of the

Northridge earthquake who had been misled by their insurers about the extent of their losses — that was clearly stated in the provision's legislative history. Pet. App. 18. Finally, the court addressed, but ultimately rejected, Allstate's contention that the legislation was unnecessary after the California Supreme Court's application of the doctrine of equitable estoppel in *Vu*. The court noted that section 340.9 provides better protection that *Vu* because it allows insureds to bring claims without having documentary proof of being misled by insurers. Pet. App. 19. Moreover, *Vu* was decided *after* § 340.9 was enacted into law. Thus, even if *Vu* had rendered § 340.9 unnecessary, that decision would not call into question the legislature's motives in enacting the statute for the legitimate public purpose of protecting insureds, who had no clear legal recourse at the time the legislation went into effect. *See Energy Reserves*, 459 U.S. at 411 ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.").

In short, the Ninth Circuit thoroughly analyzed the legislature's motives, the reasonableness and necessity of the legislation, and Allstate's objections before concluding that the legislation was constitutionally permissible. The Contract Clause requires no more.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ALLSTATE INSURANCE COMPANY,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY 1

I. IMMEDIATE REVIEW IS ESSENTIAL, BECAUSE THE PASSAGE OF TIME ALONE WILL DEFEAT THE CONSTITUTIONAL RIGHT AT ISSUE 1

II. THE DENIAL OF A PREVIOUS PETITION IN A DIFFERENT PROCEDURAL CONTEXT IS IMMATERIAL 2

III. THE ONE-YEAR LIMITATION PERIOD IS CONTRACTUAL, NOT STATUTORY 3

IV. SECTION 340.9 SUBSTANTIALLY IMPAIRS CONTRACTS 6

V. THERE IS A SPLIT AMONG THE CIRCUITS CONCERNING THE THIRD PRONG OF THE *ENERGY RESERVES* TEST 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

20th Century Ins. Co. v. Superior Court, 90 Cal.App.4th 1247 (2001) 2

California Union Ins. Co. v. Poppy Ridge Partners, 224 Cal.App.3d 897 (1990) 5

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 4, 8, 10

Estelle v. Gamble, 429 U.S. 97 (1976) 1

Great American West, Inc. v. Safeco Ins., 226 Cal.App.3d 1145 (1991) 5

Hellinger v. Farmers Group, Inc., 91 Cal.App.4th 1049 (2001) 7

Maryland Cas. Co. v. Knight, 96 F.3d 1284 (9th Cir. 1996) 3

Mercado-Boneta v. Administracion Del Fondo de Compensacion Al Paciente, 125 F.3d 9 (1st Cir. 1997) 10

Randolph Central School Dist. v. Aldrich, 506 U.S. 965 (1992) 1

Ruffino v. Queen Ins. Co., 138 Cal.App. 528 (1934) 6

Vu v. Prudential Prop. & Cas. Ins. Co., 26 Cal.4th 1142 (2001) 5

Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program, 222 F.3d 643 (9th Cir. 2000) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES

California Insurance Code § 2070 3

California Insurance Code § 2071 .....3, 4, 5, 6

California Code of Civil Procedure § 340.9 .....*passim*

28 U.S.C. § 1254..... 2

28 U.S.C. § 1257..... 2

OTHER

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) 7

PETITIONER'S REPLY

Pursuant to Supreme Court Rule 15(6), petitioner Allstate Insurance Company respectfully submits this reply to new points raised in respondents' opposition to the petition for certiorari.

I.

IMMEDIATE REVIEW IS ESSENTIAL, BECAUSE THE PASSAGE OF TIME ALONE WILL DEFEAT THE CONSTITUTIONAL RIGHT AT ISSUE

As respondents concede, this Court's power of review does not depend on whether the decision below is final. Although this Court may deny interlocutory review in "the interest of judicial economy," *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), the Court grants interlocutory review in appropriate cases. *See, e.g., Randolph Central School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting) (citing numerous examples of cases granting interlocutory review).

Here, interlocutory review is essential because deferring review would irretrievably destroy the constitutional right at issue. The petition concerns the rights not just of Allstate in this one case, but of all insurers who have been compelled to reopen thousands of closed Northridge earthquake claims. The cost of investigating such claims, defending the associated litigation, and making further payments in some cases, is estimated to be as high as $500 million. Amicus Brief of 21st Century Insurance Company, p. 1. Yet the right to be free of such costs is the essence of the contractual right of repose that California Code of Civil Procedure § 340.9 has taken from these insurers. Once such money is spent on investigation and defense, it cannot be retrieved. Thus, only prompt review can give force to the Contract Clause and restore at least some of

the benefit of the contractual right of repose. Denying review until litigation is final and the last dollar is spent would deny the affected class any prospect of meaningful relief.

II.

THE DENIAL OF A PREVIOUS PETITION IN A DIFFERENT PROCEDURAL CONTEXT IS IMMATERIAL

Respondents note that this Court denied certiorari to review a state court decision raising a similar issue in *20th Century Ins. Co. v. Superior Court*, 90 Cal.App.4th 1247 (2001), *cert. denied*, 535 U.S. 1033 (2002). Opposition, p. 6. The Court's action in *20th Century* is immaterial here.

Among other things, *20th Century* involved a petition from a non-final decision of an intermediate state court, where the state's highest court had denied review. Under 28 U.S.C. § 1257 – which imposes jurisdictional restrictions on review of state court decisions that are stricter than the requirements of 28 U.S.C. § 1254 – the Court may simply have concluded that it lacked jurisdiction.

More importantly, *20th Century* arose in a procedural context – a pleading challenge, in which all allegations must be accepted as true – that precluded review of the precise issue raised here. The issue here is whether Section 340.9 is reasonably tailored to its stated goal of protecting insureds who were misled by insurers, given that the statute deprives all insurers of their contract rights in all claims without any requirement that the insured prove deception. *20th Century* could not properly present this issue because the plaintiff there alleged that she had been misled by her insurer, and those allegations had to be accepted as true. *20th Century*, 90 Cal.App.4th at 1256. This petition, in contrast, arises from a summary

judgment. Respondents had the opportunity to present evidence that Allstate misled them, and the Ninth Circuit found that they had failed to do so. App. 9. This case therefore squarely raises that aspect of Section 340.9 which is most repugnant to the Contract Clause.

III.

THE ONE-YEAR LIMITATION PERIOD IS CONTRACTUAL, NOT STATUTORY

Respondents argue that the contractual one-year limitation provision is a creature of statute, not of contract, and thus that Section 340.9 is immune from Contract Clause review. Opposition, pp. 8-10. Respondent is incorrect for several reasons.

First, the premise of respondents' argument is false. California Insurance Code § 2071 does not dictate the contractual bargain between insurer and insured. Rather, the parties are free to bargain as they see fit, so long as the terms of the resulting contract are at least as favorable to the insured as are the model terms set forth in Section 2071. *See* Cal. Ins. Code § 2070 (insurer free to deviate from Section 2071 so long as the resulting contract, "when viewed in its entirety, is substantially equivalent to or more favorable to the insured than that contained in such standard form fire insurance policy"); *Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1293 (9th Cir. 1996) (same). Accordingly, the legislature left the selection of the contractual limitation period to the parties, subject only to the condition that such period be at least one year.

Legislatures set similar boundaries on many types of contracts, but that does not remove such contracts from the protection of the Contract Clause. For example, usury laws establish a maximum legal interest rate. But no one would contend that the act of setting a maximum interest

rate entitles a legislature to nullify contractual interest agreements at will, without Contract Clause review. Likewise here, the fact that California established a minimum contractual limitation period for insurance contracts does not mean that the legislature can retroactively nullify an agreed-upon contractual limitation period without Contract Clause scrutiny.

Put differently, the fact that a contract term is regulated by statute does not make it any less a contract term. Respondent cannot seriously contend that the insurance contract is not a contract, merely because it is partly regulated by statute. Although courts consider the existence of prior regulation in assessing the *degree* of impairment of a contractual right,[1] the existence of regulation does not remove contracts from the protection of the Contract Clause entirely.

The history of contractual limitation terms in insurance contracts makes respondents' argument especially inappropriate here. Insurers have included similar contractual limitation periods in policies since well before Section 2071 was enacted. Section 2071 simply placed California's statutory imprimatur upon this long-standing contractual practice:

> The short statutory limitation period . . . is the result of long insistence by insurance companies that they have additional protection against fraudulent proofs, which they could not meet if claims could be sued upon within four years as in the case of actions on other written instruments.

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[1] *See, e.g., Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) ("In determining *the extent of* the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.") (emphasis added).

> Originally, the shortened limitation periods were inserted into policies by insurers. Some courts declared such provisions void as against public policy while other courts enforced them in order to protect freedom of contract. In 1909, the California Legislature intervened in favor of a shortened period of limitation by enacting the predecessor to Insurance Code section 2071 to impose a 15-month limitation on claims under fire insurance policies.

Vu v. Prudential Property & Casualty Ins. Co., 26 Cal. 4th 1142, 1148 (2001) (citations and internal quotations omitted). In 1949, California gave insurers further contractual leeway by reducing the minimum limitation period to the current one year. *Id.* In light of this history, the one-year limitation provision in Section 2071 should not be viewed as imposing regulation upon insurers, but rather as a legislative judgment that the long-standing industry practice of including such contractual limitations is consistent with public policy.

Numerous cases agree that such a limitation provision, despite being codified, remains a contractual rather than a statutory deadline.[2]

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[2] *See Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program*, 222 F.3d 643, 647-48 (9th Cir. 2000) (courts "have consistently focused on the resulting policy provisions – rather than the statutes mandating their inclusion – and have found that the provisions create enforceable contractual limitations periods for bringing suit on an insurance contract."); *Great American West, Inc. v. Safeco Ins.*, 226 Cal.App.3d 1145, 1151 (1991) ("Limitations periods in insurance policies are not 'statutes' of limitation; they are contractual limitations on the insurer's liability."); *California Union Ins. Co. v. Poppy Ridge Partners*, 224 Cal.App.3d 897, 903 (1990) (policy's limitation period "is a bargained-for contractual one" and "is more personal than a statutory period of limitations");

(Continued on following page)

Finally, to accept respondents' argument would enable any legislature to avoid the Contract Clause entirely. A legislature wishing to invade contractual rights would need merely to first codify existing contractual rights. Thereafter, the contractual rights (under respondents' theory) would have to be considered statutory rights, and the legislature would be free to change those rights at will without regard to the Contract Clause.

IV.

SECTION 340.9 SUBSTANTIALLY IMPAIRS CONTRACTS

Respondents attempt to avoid the critical constitutional issue (whether Section 340.9 was reasonably tailored to its stated purpose) by arguing that Section 340.9 does not even satisfy the threshold requirement for review – that is, that Section 340.9 does not substantially impair contracts. Opposition, pp. 10-13. The Ninth Circuit, however, found the opposite, ruling that Section 340.9 does substantially impair contracts:

> Section 340.9 substantially impairs contracts between insurers and insured. It revives claims that would otherwise be barred by the contractual limitations period included in most insurance contracts pursuant to § 2071. It subjects the insurers to potential liability that they believed had long since been put to rest.

Ruffino v. Queen Ins. Co., 138 Cal.App. 528, 533 (1934) (contractual interpretation principles apply to statutory form policies).

App. 17. *Accord, Hellinger v. Farmers Group, Inc.*, 91 Cal.App.4th 1049, 1066 (2001). The Ninth Circuit's analysis in this respect is indisputably correct. When a law negates a contractual assurance of zero liability and burdens a party not only with liability but with substantial investigation and litigation expenses it had a contractual right to avoid, it is impossible to characterize the impairment as other than substantial.

Respondents' argument that Section 340.9 includes two temporal limitations (Opposition, pp. 11-12) does not lead to a different result because the temporal limitations do not substantially narrow the impact of Section 340.9. First, the fact that Section 340.9 is available only to persons who contacted their insurer about earthquake damage before January 1, 2000 is not a substantial limitation. Insurers received approximately 450,000 Northridge insurance claims,[3] essentially all of which are revived by Section 340.9.[4] Second, the fact that Section 340.9 allowed these 450,000 insureds only a one-year window in which to renew their claims is likewise not a substantial limitation. Thousands of claims, imposing industry-wide costs estimated at $500 million, have been renewed under the law. Amicus Brief of 21st Century Insurance Company, p. 1. By any measure, the impairment of contract is not merely substantial, but extreme.

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[3] Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, at 2 (http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1851-1900/sb_1899_cfa_20000619_115754_asm_comm.html).

[4] In addition, Section 340.9 also revives contractual rights for insureds who did not actually file claims but who, even informally, "contacted" their insurer about potential earthquake damage before January 1, 2000. Cal. Ins. Code §340.9(a).

V.

THERE IS A SPLIT AMONG THE CIRCUITS CONCERNING THE THIRD PRONG OF THE *ENERGY RESERVES* TEST

Petitioner adopts and endorses the analysis of *amicus* 21st Century Insurance Company concerning the split among the circuits regarding the degree of deference courts must show to the legislature in applying the third prong of the *Energy Reserves* test. Amicus Brief of 21st Century Insurance Company, pp. 13-19.

The third prong of the *Energy Reserves* test requires the reviewing court to examine whether a law that substantially impairs contracts is based upon "reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-13 (1983). As *amicus* correctly points out, the Ninth and Eleventh Circuits have interpreted *Energy Reserves* to require such extreme deference to legislative judgment that judicial review of legislation affecting private contracts is rendered illusory in these circuits. Amicus Brief of 21st Century Insurance Company, pp. 13-19.

Addressing this split, respondents attack a straw man. Opposition, p. 15. Every circuit acknowledges that *Energy Reserves* requires some deference to a legislature's determination that a particular measure is reasonably tailored to its stated public purpose. Neither *amicus* nor petitioner contends otherwise. The split concerns not the need for deference, but rather the degree of deference.

Here, the Ninth Circuit recognized that – despite the legislation's stated purpose to protect insureds who had been misled – Section 340.9 "reviv[es] Northridge earthquake claims regardless of whether the insurance company has

been shown to have acted wrongly." App. 19. Section 340.9 is thus grossly overinclusive. To protect insureds who have been misled by some insurers in some claims, Section 340.9 strips the contractual right of repose from all insurers for all claims – merely by virtue of their status as insurers – without regard to culpability.[5]

Where there exists such an obvious conflict between the narrow stated goal of legislation and the broad means adopted, *Energy Reserves* requires the reviewing court to apply at least some scrutiny to that conflict. Yet this the Ninth Circuit never did. The Ninth Circuit never asked whether Section 340.9 could have accomplished its purpose without depriving all insurers of their contractual right of repose in all cases. It never asked whether there was some way that Section 340.9 could have included at least some requirement of proving deception. The Ninth Circuit, in short, failed to undertake any meaningful judicial review of that aspect of Section 340.9 – its overbreadth – that most obviously offends the Contract Clause.

In failing to review whether Section 340.9 is reasonably tailored to its stated purpose, the Ninth Circuit decided an important constitutional question of broad impact

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[5] Respondents incorrectly characterize 340.9 in this regard. Specifically, respondents state that Section 340.9 "allows insureds to bring claims without having *documentary* proof of being misled by insurers." Opposition, p. 17 (emphasis added). Respondents' use of the qualifier "documentary" implies that Section 340.9 requires an insured to present *some* proof (but not necessarily documentary proof) of being misled, and further implies that the Ninth Circuit relied upon this supposed proof requirement to find Section 340.9 constitutional. That is not the case. Neither Section 340.9 nor the Ninth Circuit opinion contains any discussion of "documentary" proof versus other types of proof. To the contrary, the Ninth Circuit recognized that – despite its stated purpose to protect insureds who had been misled – Section 340.9 requires absolutely no proof that an insured was in fact misled. App. 19.

in a way that conflicts with the controlling precedent of *Energy Reserves* and its predecessor cases. That failure of scrutiny reflects the Ninth Circuit's incorrect interpretation of *Energy Reserves*, detailed by *amicus*, as requiring almost complete deference to legislative decisions – an interpretation that has brought the Ninth Circuit into conflict with the majority of circuits that continue to recognize the need for the reviewing court to "undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it." *Mercado-Boneta v. Administracion Del Fondo de Compensacion Al Paciente*, 125 F.3d 9, 13 (1st Cir. 1997). Review by this Court is appropriate both to enforce the significant constitutional right, and to clarify the continuing post-*Energy Reserves* requirement for judicial scrutiny to ensure that legislation impairing contracts is reasonably tailored to accomplish the public purpose justifying the impairment.

CONCLUSION

For the foregoing reasons, as well as the reasons in the opening and *amicus* briefs, the Court should grant this petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

—v.—

WILLIAM NOAH, TERRY NOAH, GEORGE GIAKOUMAKIS, MARY LOU GIAKOUMAKIS, CHERYL MONDHEIM, JAMES HOUSE, and PAT HOUSE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE 21ST CENTURY INSURANCE COMPANY IN SUPPORT OF PETITIONER

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25 pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: PAGE

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 5-7, 19

In re Bassin, 637 F.2d 668 (9th Cir. 1980) 15n

Campanelli v. *Allstate Life Insurance Co.*, 322 F.3d 1086 (9th Cir. 2003) 2, 15-17

Condell v. *Bress*, 983 F.2d 415 (2d Cir. 1993) ... 8n

England v. *Sanderson*, 236 F.2d 641 (9th Cir. 1956) 15n

Energy Reserves Group, Inc. v. *Kansas Power and Light Co.*, 459 U.S. 400 (1983) ..... *passim*

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) 14n

Garris v. *Hanover Insurance Co.*, 630 F.2d 1001 (4th Cir. 1980) 12, 18

In re Garrison, 108 B.R. 760 (Bankr. N.D. Okla. 1989) 15n

Home Building & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) 5, 7

In re LaFortune, 652 F.2d 842 (9th Cir. 1981) 15n

Lipscomb v. *Columbus Municipal Separate School District*, 269 F.3d 494 (5th Cir. 2001) 8n, 18

Marbury v. *Madison*, 1 Cranch 137 (1803) 16n

PAGE

McGrath v. *Rhode Island Retirement Board*, 88 F.3d 12 (1st Cir. 1996) 8n, 9n

Mercado-Boneta v. *Administracion Del Fondo de Compensacion Al Paciente*, 125 F.3d 9 (1st Cir. 1997) 8-9

Minnesota Ass'n of Health Care Facilities, Inc. v. *Minnesota Department of Public Welfare*, 742 F.2d 442 (8th Cir. 1984)..... 12-13

Nevada Employees Ass'n v. *Keating*, 903 F.2d 1223 (9th Cir. 1990)..... 14

Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987)..... 10-11

Sal Tinnerello & Sons v. *Town of Stonington*, 141 F.3d 46 (2d Cir. 1998) 9-10

Sanitation and Recycling Industry, Inc. v. *New York*, 107 F.3d 985 (2d Cir. 1997)..... 10n

Seltzer v. *Cochrane*, 104 F.3d 234 (9th Cir. 1996)..... 14-15, 15n

Troy Ltd. v. *Renna*, 727 F.2d 287 (3d Cir. 1984) 11n

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 6, 19

University of Hawaii Professional Assembly v. *Cayetano*, 183 F.3d 1096 (9th Cir. 1999)..... 8n, 14n

Vesta Fire Insurance Corp. v. *Florida*, 141 F.3d 1427 (11th Cir. 1998) 18

PAGE

Walker v. *Mather*, 959 F.2d 894 (10th Cir. 1992) 19

Constitutional Provisions:

U.S. Const. art. I, § 10, cl. 1 .....*passim*

Rules:

U.S. Sup. Ct. R. 37(2)(a) 1

Statutes:

Cal. Civ. Proc. Code § 340.9 (West Supp. 2003)..... 1

Treatises:

2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* (3d ed. 1999) 3

Other Authorities:

Assem. Comm. On Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, p.2; Sen. Rules Comm. Off. of Sen. Floor Analysis, Third Reading Analysis of Sen. Bill 1899 (1999-2000 Reg. Sess.) as amended May 2, 2000, p. 4)..... 2

Petition for Writ of Certiorari in *Allstate Insurance Co.* v. *Noah* (No. 03-341)..... 2

The Federalist No. 44 (James Madison)..... 6

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37(2)(a) of the Rules of this Court, this brief is respectfully submitted on behalf of *amicus curiae* 21st Century Insurance Company in support of the Petition for a Writ of Certiorari filed by Petitioner Allstate Insurance Company. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.[1]

Amicus 21st Century Insurance Company is a California corporation that transacts insurance business in California and other states. As of January 1, 1994, *amicus* had issued thousands of insurance policies in California providing earthquake coverage. All of them contained one-year contractual limitations provisions. Later in 1994, a significant earthquake occurred in Northridge, California (the "Earthquake"). Seven years later, the California legislature enacted California Code of Civil Procedure Section 340.9 ("Section 340.9"), which negated the one-year contractual limitations period and extended the period for insureds to bring claims for damage arising out of the Earthquake until December 31, 2001. Insureds in California were thus given legislative carte-blanche to bring renewed claims against their insurance companies for such claims. *Amicus* received over 2000 such claims which have so far resulted in total paid and estimated future costs, including costs for investigating alleged Earthquake damage and defending litigation, of over $150 million. The industry-wide cost of Section 340.9 is estimated to be as high as $500 million. This is in addition to compensation

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[1] No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief.

totaling between $12.5 and $15.3 billion paid by insurers in the immediate aftermath of the Earthquake. (Assem. Com. On Judiciary, Analysis of Sen. Bill No. 1899 (1999-2000 Reg. Sess.) as amended May 23, 2000, p.2; Sen. Rules Com. Off. of Sen. Floor Analysis, Third Reading Analysis of Sen. Bill 1899 (1999-2000 Reg. Sess.) as amended May 2, 2000, p.4).

The California legislature's goal in enacting this retroactive legislation was to address allegations that certain policy holders had been misled by their insurers regarding the extent of damage to their properties following the Earthquake. *See* Petition at 15-17. The legislative means chosen to address this goal, however, was a statute that did not discriminate between claims made by misled policy holders and claims made by other policy holders. Rather, the statute revived *all* claims, as long as the insured contacted his insurer regarding potential damage before January 1, 2000. The Ninth Circuit acknowledged this overbreadth when it conceded that "[Section] 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims *regardless* of whether the insurance company has been shown to have acted wrongly." *Campanelli* v. *Allstate Life Insurance Co.*, 322 F.3d 1086, 1099 (9th Cir. 2003) (emphasis added). The court nevertheless sustained the substantial retroactive impairment of California insurers' contractual expectations effected by Section 340.9, believing its hands were tied by a wholesale deference to state legislative judgment that this Court has never required. Notably, in assessing the constitutionality of the statute, the Ninth Circuit failed to perform the necessary analysis of the relationship between the purported problem and the legislative solution.

Amicus believes that its contracts may not be retroactively and arbitrarily redrafted by the California legis-

lature without violating the Contract Clause of the United States Constitution. *Amicus* accordingly agrees with and supports the arguments advanced by Petitioner in its Petition for a Writ of Certiorari. In this brief, however, *amicus* focuses on the manifest confusion among the Courts of Appeals in assessing the constitutionality of statutes that significantly—and retroactively—impair private contracts. Specifically, *amicus* urges the Court to clarify that giving deference to legislative determinations in such contexts does not relieve the lower courts of the responsibility for determining whether there is a required correlation between the legitimate public problem and the legislative solution.

SUMMARY OF ARGUMENT

The Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, has historically played a critical role in limiting the States' power to interfere with contracts between private parties. Indeed, the Framers' original purpose in drafting the Contract Clause was to protect private debtor obligations. *See* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 15.8 (3d ed. 1999). This Court's decisions have made clear that the three-part test distilled in *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.*, 459 U.S. 400 (1983) from this Court's earlier Contract Clause jurisprudence, applies both to contracts between private parties and to public contracts to which the State itself is a party.

A survey of Contract Clause cases in Federal Courts of Appeals in recent years, however, reveals deep confusion as to the proper degree of deference to be accorded legislative judgments of the necessity and reasonableness of

a statute that substantially impairs private contractual obligations. Some Circuits follow this Court's teaching that after a finding of significant impairment, a court must independently determine that the scope of the retroactive legislation is reasonably coextensive with the problem addressed. Other Circuits, notably the Ninth Circuit, from which the instant Petition emanates, have completely deferred to the legislative judgment as to the reasonableness and necessity of a statute impairing private contracts so that no true inquiry is made into the tailoring of the legislation to the stated harm. Indeed, in a series of recent decisions, the Ninth Circuit has misread *Energy Reserves* as signaling a "retreat" from this Court's prior Contract Clause opinions and as advocating total deference to state legislative judgment. This misreading has led the Ninth Circuit to give such perfunctory consideration to the third prong of the *Energy Reserves* test—ensuring that the retroactive legislation is both necessary and reasonable to address the stated harm—that it in essence allows States to engage in significant impairments of private contracts without any meaningful judicial review. Courts of Appeals in the First, Second, Third, Fourth and Eighth Circuits have generally adhered to this Court's teachings. The Ninth Circuit, as well as the Eleventh Circuit, have not.

The current case illustrates the error of wholesale deference. The "tailoring" analysis performed by the Ninth Circuit was so inadequate that its deference was all but conclusive. To permit lower courts to accord such undue deference to legislatures that have significantly impaired contractual rights would eviscerate the protections bestowed by the Contract Clause, a result contrary to the opinions of this Court and the intent of the Founders. *See*

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234, 245 (1978).

Amicus urges this Court to clarify that when private contracts have been substantially impaired by retroactive legislation, courts must not abdicate to legislatures the key constitutional determination that the retroactive legislation is reasonably tailored to address the legitimate public purpose sought to be addressed. Without this clarification, the meaning and vitality of the Contract Clause will be subverted.

ARGUMENT

The "*Energy Reserves* test," distilled from this Court's opinions in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934) and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), instructs courts presented with a Contract Clause challenge first to assess, as a "threshold inquiry . . . 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves*, 459 U.S. at 411 (quoting *Allied Structural Steel*, 438 U.S. at 244). If a substantial impairment is found, the court must next determine that the State has justified the legislation as addressing a "significant and legitimate public purpose." *Id.* This prong of the *Energy Reserves* test is necessary to "guarantee[ ] that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412. Finally, the court must inquire "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Id.* at 413

(quoting *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977)).

The *Energy Reserves* test represents this Court's accommodation between the unequivocal language of the Contract Clause, "one of the few express limitations on state power" in the Constitution, *United States Trust*, 431 U.S. at 14, and the " 'essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens." *Id.* at 21 (quoting *Blaisdell*, 290 U.S. at 435). Thus, the Contract Clause, originally intended to be a "constitutional bulwark in favor of personal security and private rights," The Federalist No. 44 (James Madison), was required to yield to the valid exercise of the States' police power. *Energy Reserves*, 459 U.S. at 413.

Neither *Energy Reserves* nor any other case of this Court, however, has abandoned wholesale the requirement that States may only substantially impair private contracts when it is necessary and reasonable to do so. The required deference to state legislative judgment cannot render judicial review superfluous. To the contrary, the determination of a substantial impairment has been recognized as only a "preliminary step" in the constitutional inquiry, while the remaining factors constitute the core of the analysis. *See United States Trust*, 431 U.S. at 21 ("[A] finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."); *see also Energy Reserves*, 459 U.S. at 418 (conducting analysis of "the means chosen to implement these purposes" notwithstanding stated deference to the legislature); *Allied Structural Steel*, 438 U.S. at 247 (holding that "[t]he presumption favoring 'legislative judgment as to the necessity and reason-

ableness of a particular measure,' simply cannot stand in this case")(citation omitted); *Blaisdell*, 290 U.S. at 445. While *Energy Reserves* recognized the deference to be afforded to state legislatures, the decision cannot be read as eliminating the constitutional analysis altogether in the context of private contracts. Rather, in *Energy Reserves*, this Court pursued a detailed analysis of the reasonableness and narrowness of the Kansas Natural Gas Protection Act. *See Energy Reserves*, 459 U.S. at 418. Indeed, in *Energy Reserves* this Court recognized that "[a]lthough the legal issues and facts in [*United States Trust Co.* and *Spannaus*] differ in certain ways, they clarify the appropriate Contract Clause standard." 459 U.S. at 411. The "appropriate" standard set forth was the commonly known three-prong test; it did not abandon any aspect of the inquiry due to the private nature of the contract, noting only that because the State was *not* a party to the underlying obligations, "the stricter standard of *United States Trust Co.* does not apply." *Id.* at 413 n.14.

Total deference exempts questionable legislation from any inquiry at all as to the proper fit of the legislation to its purpose, and means, as a practical matter, that legislation that substantially impairs private contracts to which the State is not a party will routinely pass constitutional muster. Judicial review as to the tailoring of a statute, however, is essential to ensure that the Framers' intent that the Clause serve as a limitation on state power remains potent. *Allied Structural Steel*, 438 U.S. at 242 ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

In recent years, Circuit Courts have frequently undertaken the requisite inquiry mandated by this Court's Contract Clause jurisprudence under the *Energy Reserves* test. When assessing the constitutionality of challenged legislation that substantially impairs contracts between private parties, however, the Circuits have employed inconsistent levels of deference to state legislative judgments and have applied haphazard tailoring analyses.[2] The Courts of Appeals for the First, Second, Third, Fourth and Eighth Circuits have generally understood their obligations under *Energy Reserves* to determine that the retroactive state legislation that substantially impairs contracts to which the State is not a party is drafted reasonably to remedy the stated pubic purpose. Courts of Appeals from the Ninth and Eleventh Circuits, in the name of deference, have abdicated completely their responsibility to assess independently whether the legislation provides a reasonable fit to the problem addressed.

I. The Complying Courts of Appeals

Mercado-Boneta v. *Administracion Del Fondo de Compensacion Al Paciente*, 125 F.3d 9 (1st Cir. 1997) presented the First Circuit with a Contract Clause challenge to a statute abrogating a malpractice liability insurance fund. The Court acknowledged that a defer-

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[2] In contracts between private parties on the one hand, and state entities on the other, Circuit Courts have generally scrutinized the reasonableness and necessity of an impairment of obligations under a less deferential standard. *See, e.g.*, *Lipscomb* v. *Columbus Municipal Separate School District*, 269 F.3d 494, 511-12 (5th Cir. 2001); *University of Hawaii Professional Assembly* v. *Cayetano*, 183 F.3d 1096, 1106 (9th Cir. 1999); *McGrath* v. *Rhode Island Retirement Board*, 88 F.3d 12, 16 (1st Cir. 1996); *Condell* v. *Bress*, 983 F.2d 415, 418 (2d Cir. 1993). This less deferential standard is appropriate in these cases because the State stands to gain from its own retroactive impairment.

ential standard of review was appropriate, but reasoned it still "must undertake its own independent inquiry to determine the reasonableness of the law and the importance of the purpose behind it." 125 F.3d at 13. The court did so, determining that the abrogation was both reasonable and necessary to protect the public interest in a "well-functioning medical malpractice insurance system." *Id.* at 15. It concluded that the legislation's cut-off date for honoring claims under the old insurance system was sufficiently tailored to the legislative problem so that claims and the affairs of the insurance fund could be brought to finality. *Id.* at 17-18.[3]

The Second Circuit has also thoroughly analyzed the connection between the public problem and the legislative solution. In *Sal Tinnerello & Sons* v. *Town of Stonington*, 141 F.3d 46 (2d Cir. 1998), the court reviewed an ordinance that provided for the municipal takeover of commercial waste collection and disposal. The ordinance prohibited private parties from removing, transporting or disposing solid waste, thereby impairing existing contracts held by private haulers. Although the court expressed its opinion that there was a "serious question whether [plaintiff] can prove that the impairment is a substantial one," 141 F.3d at 53, it nevertheless undertook an inquiry as to the correlation between the municipality's stated goals and its chosen means. The court observed that the public purposes behind the ordinance included: (1) controlling disposal of solid waste without

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[3] *See also McGrath*, 88 F.3d at 16 ("Because this fourth component requires careful judicial scrutiny in all events, it is clear that a state must do more than mouth the vocabulary of the public weal in order to reach safe harbor; a vaguely worded or pre-textual objective, or one that reasonably may be attained without substantially impairing the contract rights of private parties, will not serve to avoid the full impact of the Contracts [sic] Clause.").

imposing a tax increase; (2) avoiding CERCLA liability by ensuring that waste disposal was conducted at a plant with the proper permits; and (3) providing an equitable volume-based user fee for generators of commercial waste. *Id.* at 50. In assessing whether the means chosen to accomplish these goals were reasonable, the court concluded that the municipal takeover ensured that solid waste would be delivered to an incinerator possessing the proper permits and served important economic interests by ensuring against defaults on the bonds that financed the plant and rendering unnecessary a government subsidy of the plant's tipping fees. *Id.* at 54. It further observed that the means chosen were reasonable in that outside haulers were permitted to continue to operate as contractors to the Town. *Id.* at 55.[4]

Nieves v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987) presented the Third Circuit with a constitutional challenge to a retroactive amendment of the Virgin Islands Workmen's Compensation Act which eliminated the "borrowed employee" doctrine as a bar to pending tort suits. Because the Virgin Islands was not a party to the contract, the Third Circuit rejected appel-

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[4] *See also Sanitation and Recycling Industry* v. *New York*, 107 F.3d 985 (2d Cir. 1997). In *Sanitation*, the Second Circuit addressed constitutional challenges to Local Law 42 which imposed restrictions on New York City's commercial carting business in an effort to combat the pervasive corruption in the industry. After concluding that the law substantially impaired existing carting contracts and that the City's stated goal of eradicating the vestiges of criminal control of the carting industry was legitimate, it proceeded to the "ultimate question" of whether the City "has chosen reasonable means to achieve its legitimate purpose." 107 F.3d at 994. It concluded that "gradually phasing out [old] contracts and arranging for new carting contracts to be negotiated in an atmosphere free of coercion is a reasonable accommodation between the impairment of plaintiff's contracts and the City's exercise of its police power." *Id.*

lants' argument that a heightened level of scrutiny should be applied because the Virgin Islands stood to recoup revenue from the legislation. Instead, the court deferred to the legislative judgment as to the amendment's necessity and reasonableness. 819 F.2d at 1243, 1249. But the court did not interpret deferential review to mean that no serious inquiry was required. Rather, the court looked to the legislative history of the enactment to discern that the legislature was aware that the primary impact of the amendment would be on the appellant and that the legislature expressly sought to overturn application of the borrowed employee doctrine in several pending cases against appellant. *Id.* at 1250. It thus concluded that the legislation was not aimed at the general welfare but rather was akin to special interest legislation. *Id.* at 1250-51. The court assessed the necessity and reasonableness of the means chosen to accomplish the legislature's stated goals to conclude that the retroactive application of the legislation could not be justified by the goal of recouping Workmen's Compensation expenditures, finding that "if recouping past expenditures could justify a retroactively established cause of action the circumscription of the Contract Clause would be rendered practically meaningless." *Id.* at 1251-52.[5]

The Fourth Circuit, as well, while acknowledging that deference was owed to the state's legislative judgment in the review of an impairment of a private contract, nev-

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[5] The Third Circuit also acknowledged that "extra" deference was required in the private contract arena in *Troy Ltd.* v. *Renna*, 727 F.2d 287 (3d Cir. 1984), to find that a retroactive amendment to New Jersey's Tenancy Act did not violate the Contract Clause. In so doing, however, the Third Circuit did not slavishly rubber stamp the New Jersey legislature's findings, but ascertained that the application of the retroactive amendment was restricted by a reasonable personal income test and the discretion of the New Jersey state courts. *Id.* at 298.

ertheless undertook its duty . . . simply and inescapably to give [its] independent, considered judgment as to whether [the South Carolina Automobile Reparation Reform Act of 1974] makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris* v. *Hanover Insurance Co.*, 630 F.2d 1001, 1009 (4th Cir. 1980). The challenged law prevented automobile insurers from terminating agent contracts under certain conditions. The court compared the stated purpose of the law—"to make compulsory automobile insurance available on a nondiscriminatory basis to all drivers licensed by the state"—with the legislation's scope to determine if the "fit" between the two was reasonable. It determined that the legislation's strictures on agency cancellation rights were too attenuated from the legislation's goal to be necessary. While the court acknowledged that without the agency cancellation protections, some insurance agents might suffer economically, and thus, some drivers would be inconvenienced in procuring car insurance, other provisions of the Act provided adequate assurances that drivers would be able to procure insurance so as to satisfy the legislation's stated purpose. Thus, the agency cancellation provision was an unnecessary and unreasonable impairment of private contractual obligations. 630 F.2d at 1010-11.

The Eighth Circuit confronted a constitutional challenge to a Minnesota statute that, as a condition of participation in the state's Medicaid program, put a cap on the rates nursing homes could charge residents who did not receive state assistance benefits. ***Minnesota Ass'n of Health Care Facilities, Inc.*** v. ***Minnesota Department of Public Welfare***, 742 F.2d 442 (8th Cir. 1984). The court concluded that the portion of the law that prospectively

equalized the rates nursing homes could charge residents who received state aid with those who did not, was constitutional because the gradual implementation of the rate limitations was a reasonable means to achieve the important public purpose of providing "adequate compensation to prudently managed nursing homes." *Id.* at 451. However, in assessing that part of the statute which retroactively required restitution of charges in excess of the new statutory limits, the court determined that the statute went "too far" in "impos[ing] totally unexpected liability on nursing homes for charges that were permitted by law when collected . . . [and] disrupt[ing] settled and completed financial arrangements under contracts made in reliance on existing law." *Id.*

All these Courts of Appeals have thus adhered to the core obligation placed upon them by *Energy Reserves*, that of assuring that the retroactive legislation is tailored to address the stated public purpose and imposes no unnecessary impairment on contractual expectations. A starkly different result has been reached in the Ninth and Eleventh Circuits.

II. The Non-Complying Courts of Appeals

The obligation imposed by *Energy Reserves* to ensure that retroactive legislation effects no more of an impairment than is necessary to address the stated public purpose, has, in recent years, been treated by the Ninth and Eleventh Circuits in a cursory and one-dimensional manner. The Ninth Circuit, as reflected in this case, has erroneously read the third prong of the *Energy Reserves* test as either requiring nothing but a rubber stamp to the State's legislative judgment or at most, the application of a pro forma inquiry that is neither thorough nor

searching.[6] In two cases released after this Court's ruling in *Energy Reserves*, the Ninth Circuit articulated the jurisprudential background of its ruling in this case. In both, the Ninth Circuit articulated a reading of *Energy Reserves* that is inconsistent with that case.

In *Nevada Employees Ass'n* v. *Keating*, the Ninth Circuit declared—as this Court never had—that in *Energy Reserves* this Court had "retreated from its holding in *Spannaus*" (a case in which this Court struck down a Minnesota statute which impaired private contracts), in what it termed "a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts." 903 F.2d 1223, 1226 (9th Cir. 1990).[7]

Again, in *Seltzer* v. *Cochrane*, the Ninth Circuit mischaracterized *Energy Reserves* as representing a "shift in the law" which emphasized all but total deference to state legislatures. 104 F.3d 234, 236 (9th Cir. 1996). In assessing a trustee's objections to an exemption claimed by debtors in their individual retirement accounts, the court held that the trustee had failed to meet his burden of demonstrating that the retroactive application did not "serve a valid public purpose," indicating that the cases

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[6] The Ninth Circuit, on the other hand, has recognized the importance of this inquiry when examining contracts to which state entities are parties. *See, e.g., University of Hawaii Professional Assembly* v. *Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) ("An impairment may not be considered necessary if there is 'an evident and more moderate course' of action that would serve Defendants' 'purpose equally well.' ") (citation omitted).

[7] *Keating*'s conclusion that *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983) also signaled a "retreat" by this Court from its previous Contract Clause jurisprudence is similarly incorrect. *Exxon* belonged to a subset of Contract Clause cases addressing price scheduling in the utility market, which governed the Court's decision.

on which the trustee had relied in which the Ninth Circuit previously invalidated retroactive application of such state exemption statutes, "were decided before *Energy Reserves*, and thus did not give appropriate deference to legislative judgments."[8] *Id.*

The same mistaken view of *Energy Reserves* informed the Ninth Circuit's treatment of this case. In upholding the constitutionality of Section 340.9, the Ninth Circuit utterly eschewed the third component of the *Energy Reserves* test even after concluding that "Section 340.9 substantially impairs contracts between insurers and insureds." 322 F.3d at 1098. In so doing, the court relied on *Seltzer*, *supra*, to conclude that "[u]nless the state is a party to the contract, courts 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Id.* Although the court ostensibly reviewed the "character" of Section 340.9 and its " 'appropriate[ness] to the public purpose justifying the legislation's adoption,' " *id.* at 1099 (citation omitted), its analysis was, in fact, nothing but an abandonment of the very notion of judicial review.[9]

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[8] The cases were *In re LaFortune*, 652 F.2d 842 (9th Cir. 1981), *In re Bassin*, 637 F.2d 668 (9th Cir. 1980) and *England* v. *Sanderson*, 236 F.2d 641 (9th Cir. 1956). In *In re La Fortune*, particularly, the Ninth Circuit illustrated its original correct apprehension of the proper constitutional analysis, albeit pre-*Energy Reserves*. Specifically, the court there conducted a thorough review of the fit of the California bankruptcy exemption, 652 F.2d at 848, a point which the Ninth Circuit in *Seltzer* explains as "not giv[ing] appropriate deference to legislative judgments." 104 F.3d at 236.

[9] Notably, the decision in *In re Garrison*, 108 B.R. 760 (Bankr. N.D. Okla. 1989), which the Ninth Circuit explicitly rejected in *Seltzer*, made the very argument advanced by *amicus* here. In *Garrison*, the Bankruptcy Court of the Northern District of Oklahoma disagreed with the argument advanced by the debtor that "courts must

The Ninth Circuit recognized that the stated purpose of Section 340.9 was to remedy the purported misleading of insureds, *id.* at 1099; however, it sustained a statute which did not discriminate between misled insureds and other policy holders. In fact, Section 340.9 was so broad that any insured who merely "contacted" his insurer prior to January 1, 2000 regarding "potential damage" was given the benefit of the seven-year legislative extension of his or her contractual right to submit a claim. While the Ninth Circuit stated that there were "limits" to the statute, it made no meaningful inquiry as to the proper "fit" between the problem posed and the solution presented. The "limits" cited by the

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defer absolutely to the legislative judgment as to the necessity and reasonableness of a particular measure, effectively striking the third step or test in the [*Energy Reserves*] analysis." 108 B.R. at 766-67. The debtor's supposed authority for such a sweeping statement was from this Court's decision in *Energy Reserves* and its predecessors, but the court disagreed, holding that "[n]either of these authorities say anything about absolute deference by courts to the whim of the legislature, no matter how ill-explained or ill-advised." *Id.* at 767. Rather, the court held that

> "[a] fair reading of the statement of the third test in *Energy Reserves* . . . indicates that the question of reasonable legislative means in Contract Clause cases should be treated somewhat like the question of reasonable legislative means in other cases wherein courts are asked to 'review . . . economic and social legislation.' In other such cases, courts are not expected to give absolute deference to legislative judgment. Legislative means must appear at least minimally reasonable to the courts in cases involving police power, substantive due process, and equal protection." *Id.*

Looking to *Marbury* v. *Madison*, 1 Cranch 137, 175-180 (1803), the court explained that its conclusion "is what one would expect, since courts of the United States do not abdicate decision of constitutional questions to the legislature." *Id.* Finally, it concluded that "[t]his Court will look at legislative enactments respectfully, but will not shut its eyes." *Id.*

Ninth Circuit have little if any relationship to the stated harm, and thus cannot be viewed as tailored to the stated public purpose. Indeed, the Ninth Circuit acknowledged that "[Section] 340.9 is undeniably broad in its scope, reviving Northridge earthquake claims regardless of whether the insurance company has been shown to have acted wrongly." *Id.*

The first so-called "limit" recognized by the court, that Section 340.9 "revives only claims that resulted from the Northridge earthquake, a one-time event with a discrete, albeit large, number of victims," *id.*, itself acknowledges that the number of claims potentially attributable to such a statute can be (as it has been) astounding, thus underscoring the overbreadth of the statute. That the statute was "limited" with reference to the very event that precipitated its enactment is not even meaningful; this supposed limit does not tailor the breadth of the statute to the purpose of its enactment. The court recognized that the second supposed "limit," that "only plaintiffs who had contacted an insurer prior to January 1, 2000, have their claims revived," *id.*, would prevent fraudulent claims invented to take advantage of the new statute, but failed to acknowledge that it did not address the wrongs which allegedly prompted the legislation. Finally, the third "limit"—the temporal restriction of one year—does not advance the reasons for the statute or contain its sweeping scope. *Id.* As the court itself acknowledged, even a one-year revival was sufficient to cause substantial impairment of private contracts. *Id.* at 1098.

As a practical matter, then, Section 340.9 revived claims without any regard to the supposed culpability or misconduct that the legislation was designed to remedy. It is apparent that in sustaining the constitutionality of

the statute, the Ninth Circuit did not begin to employ the necessary "independent, considered judgment as to whether the legislative enactment makes a rational accommodation between the affirmative power exercised by the state and the negative safeguard embodied in the Contract Clause." *Garris*, 630 F.2d at 1009.

The Eleventh Circuit, as well, appears to have abdicated its constitutional duty to review the fit between a Florida statute that forced insurers to continue to provide residential line insurance for hurricane damage in the wake of Hurricane Andrew and the public purpose it was designed to address. *See Vesta Fire Insurance Corp.* v. *Florida*, 141 F.3d 1427 (11th Cir. 1998). The court found that the legislation substantially impaired the insurers' contractual rights because they were "forced to continue contractual relationships that otherwise, pursuant to the terms of the contracts, could be rightfully terminated." *Id.* at 1433. The court next determined that Florida had demonstrated a legitimate public purpose for the legislation in the protection and stabilization of the Florida economy and real estate market. *Id.* at 1434. When it reached the third prong of the *Energy Reserves* test, however, the Court conducted no analysis whatsoever. It summarily concluded that "[t]he State was no party to the insurance contracts; so based upon the legislature's judgment, the statutes' impact on existing insurance contracts cannot be said to be an unconstitutional impairment." *Id.*; *see also Lipscomb*, 269 F.3d at 505 (in determining whether the subsequently adopted Mississippi Constitution's impairment of certain school land leases violated the Contract Clause, the court noted that were it reviewing a purely private contract, it would "not independently review the reasonableness of the legislation; it [would] defer to the judgment of the legisla-

ture"); *Walker* v. *Mather*, 959 F.2d 894, 899-900 (10th Cir. 1992) (acknowledging that an Oklahoma bankruptcy exemption statute "may not be an 'example of legislation at its fairest' " but concluded that the court could not upset the legislature's policy choice).

Although this Court has recognized the deference owed to legislatures in examining the constitutionality of statutes that impair private contracts, it has never suggested bypassing, as the Ninth Circuit did here, analysis of the "means chosen to implement the[ ] purposes." *Energy Reserves*, 459 U.S. at 418; *see also Allied Structural Steel*, 438 U.S. at 244; *United States Trust*, 431 U.S. at 22. Such an approach would gut all meaning from the protections afforded by the Contract Clause. This Court should take this opportunity to assure that retroactive legislation that does significantly impair contracts is subject to the level of judicial review that the Contract Clause requires.

CONCLUSION

For the foregoing reasons, this Court should grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

October 1, 2003

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(3)

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IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

WILLIAM NOAH, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR HOMESTEAD INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, in contravention of applicable decisions of this Court and other courts, that the Constitution does not prohibit a State from retroactively abrogating a limitations provision in a contract for insurance.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
INTEREST OF AMICUS 1
ARGUMENT 2
CONCLUSION 6

TABLE OF AUTHORITIES

Cases

20th Century Insurance Co. v. Superior Court, 90 Cal. App. 4th 1247 (2001), *cert. denied*, 535 U.S. 1033 (2002) 5

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 6

Campanelli v. Allstate Insurance Co., 322 F.3d 1086 (9th Cir. 2003) 6

Campbell v. Holt, 115 U.S. 620 (1885) 2

Energy Reserves Corp. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 5

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 748 (1941) 2

Farmers' Co-operative Creamery Co. v. Iowa State Insurance Co., 84 N.W. 904 (Iowa 1900) 4

Hellinger v. Farmers Group, Inc., 91 Cal. App. 4th 1049 (2001) 1, 5

Home Insurance Co. v. Dick, 281 U.S. 397 (1930) 2, 3, 4, 5

Kee v. Shelter Insurance, 852 S.W.2d 226 (Tenn. 1993) 4

National Surety Co. v. Architectural Decorating Co., 226 U.S. 276 (1912) 3

Riddlesbarger v. Hartford Insurance Co., 74 U.S. (7 Wall.) 386 (1868) 2

Smith & Marsh v. Northern Neck Mutual Fire Ass'n, 70 S.E. 482 (Va. 1911) 5

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 6

Vu v. Prudential Property & Casualty Insurance Co., 26 Cal. 4th 1142 (2001) 5

Weisberg v. Royal Insurance Co., 464 N.E.2d 1170 (Ill. App. Ct. 1984) 3

Wells v. Union Central Life Insurance Co., 98 S.W. 697 (Ark. 1906) 5

Statutes

Cal. Code Civ. Proc. § 340.9 ..... 1, 2, 3, 4

Other Authorities

Annot., 112 A.L.R. 1288 (1938) 5

Annot., 16 A.L.R. 3d 452 (1967) 5

BRIEF FOR HOMESTEAD INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING PETITIONER

Amicus Curiae Homestead Insurance Company respectfully submits that the petition for a writ of certiorari should be granted.[1]

INTEREST OF AMICUS

Homestead wrote insurance policies on commercial property in California that required all actions to be commenced within twelve months of the loss. In light of this contractual limitation, Homestead has long since resolved all claims arising out of the 1994 Northridge earthquake.

In 2000, the California Legislature purported to "revive" Northridge claims notwithstanding the expiration of any applicable *statute* of limitations. Cal. Code Civ. Proc. § 340.9. The state courts subsequently extended this "revival" feature to actions barred by *contractual* limitations periods. *Hellinger v. Farmers Group, Inc.*, 91 Cal. App. 4th 1049, 1056-59 (2001). Under this new statute, several of Homestead's insureds have initiated actions seeking additional Northridge-related damages.

Homestead agrees with petitioner Allstate Insurance Company that Section 340.9 violates the Contracts Clause of the United States Constitution. *See infra* at 5-6 & n.2. Homestead respectfully submits this brief to further demonstrate that the issue warrants this Court's review.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

ARGUMENT

This Court has long recognized that "insurers have a right to designate the terms upon which they will be responsible for losses," including setting a reasonable time within which the insured must initiate suit under the policy. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868). And California (like other American jurisdictions) has concluded that requiring the insured to sue within one year is a valid, reasonable, and enforceable contractual limitation. *Fageol Truck & Coach Co. v. Pacific Indem. Co.*, 18 Cal. 2d 748, 753 (1941). But California Code of Civil Procedure § 340.9 abrogates the one-year limitation included as a material term of the contracts of insurance issued by Homestead and other insurers.

The decision below, in which the Ninth Circuit concluded that Section 340.9's wholesale abrogation of a contractual obligation does not violate the Contracts Clause, cannot be reconciled with this Court's decision in *Home Insurance Co. v. Dick*, 281 U.S. 397, 410 (1930). In *Dick*, the Court held that a State could not constitutionally extend liability under an insurance contract "beyond the limit expressly agreed upon by the parties." *Id.* at 409 n.6.

The *Dick* Court drew a sharp distinction between statutes of limitation and contractual limitation periods, explaining that a contractual provision "differ[s] from the statutory limitation in . . . that it does not merely deny the remedy, but forfeits the liability, when the suit is not brought within the stipulated time." 281 U.S. at 406 n.4 (quotation omitted). As a result, a contractual limitation "deals neither with the kind of remedy available nor with the mode in which it has to be pursued"; rather, "[i]t purports to create rights and obligations." *Id.* at 410.

The distinction between statutory and contractual limitations periods is critical. In cases such as *Campbell v. Holt*, 115 U.S. 620 (1885), this Court has sustained against consti-

tutional challenge changes to *statutes* of limitations. But the *Dick* Court made clear that *contractual* limitations periods are entitled to considerably more constitutional protection:

> It is true that a state may extend the time within which suit may be brought in its own courts, *if, in doing so, it violates no agreement of the parties*. . . . [But when] the parties have expressly agreed upon a time limit on their obligation, a statute which invalidates the agreement and directs enforcement after the time has expired increases their obligation and imposes a burden not contracted for.

281 U.S. at 408-09 & n.6 (emphasis added).

This Court, in *Dick*, held that a state law that attempted to do precisely what Section 340.9 purports to do—*i.e.*, impose insurance liability after the contractual expiration period has run—was unconstitutional. Although the Court's decision ultimately rested on the Due Process Clause, the Court left no doubt that the same result would obtain under the Contracts Clause. Indeed, the Court cited a Contracts Clause precedent for the principle that "[t]here is a clear difference between the revival of a liability which is unenforceable only because a statute has barred the remedy regardless of the will of the parties, and the extension of a liability beyond the limit expressly agreed by the parties." 281 U.S. at 409 n.6 (citing *National Sur. Co. v. Architectural Decorating Co.*, 226 U.S. 276 (1912)).

Subsequent courts have relied on *Dick* to conclude that a State may not constitutionally abrogate a contractual limitations period. *See Weisberg v. Royal Ins. Co.*, 464 N.E.2d 1170, 1174-75 (Ill. App. Ct. 1984). As the Tennessee Supreme Court has explained in refusing to enforce a statute similar to Section 340.9:

> At the time the insurance contract was executed and at the time of loss, the law of this state, as incorpo-

> rated into the contract, required that the suit [be] commenced within the contractually limited time .... The amendment, if applied retrospectively, negates that requirement and allows the policyholder to extend his cause of action, despite the fact that he failed to comply with the contractual obligation. Clearly, retrospective application of the amendment would impair the accrued contractual rights of the insuror.

Kee v. Shelter Ins., 852 S.W.2d 226, 229 (Tenn. 1993). The decision below is irreconcilable with these authorities.

The decision below also conflicts dramatically with the Supreme Court of Iowa's decision in *Farmers' Co-operative Creamery Co. v. Iowa State Insurance Co.*, 84 N.W. 904 (Iowa 1900). The court there explained that a contractual limitation "is plainly distinguishable from one created by statute, and courts with great unanimity have so held." *Id.* at 904. In terms that this Court would echo in *Dick*, the court elaborated:

> Statutes of limitations are, of course, enacted by the legislature, and pertain exclusively to the remedy, and, with some exceptions not necessary to be stated, may be changed by the legislature so as to affect existing contracts. Contract rights and obligations cannot, as a general rule, be changed by subsequent legislation.... [B]y the uniform holding of the courts the contract relates, not simply to the remedy, but that it extinguishes rights. The statute ... undertakes to limit contract rights, and nothing more.

Ibid. The court noted that "[t]hese views ... have never been questioned, so far as we have been able to discover." *Ibid.* And so the law remained for more than a century, until the Ninth Circuit endorsed a contrary rule.

The decision below, and the state cases construing Section 340.9 (*Hellinger* and *20th Century Ins. Co. v. Superior Court*, 90 Cal. App. 4th 1247 (2001), *cert. denied*, 535 U.S. 1033 (2002)) that the Ninth Circuit ultimately endorsed, are the only decisions of which *amicus* is aware in which a statute, enacted after the issuance of a policy with a contractual limitations provision and after the occurrence of the loss that forms the basis of the claim, has been held to validly "revive" a contractually barred claim. *See Wells v. Union Cent. Life Ins. Co.*, 98 S.W. 697 (Ark. 1906); *cf. Smith & Marsh v. Northern Neck Mut. Fire Ass'n*, 70 S.E. 482 (Va. 1911). The invalidity of statutes like Section 340.9 has thus been settled law for over a hundred years. *See generally* Annot., 16 A.L.R. 3d 452 (1967); Annot., 112 A.L.R. 1288 (1938).

The decision below contravenes a century of precedent, including this Court's decision in *Dick*. Under existing law, a statute like Section 340.9 could not be applied in Arkansas, Iowa, Tennessee, Illinois, Virginia, or a number of other jurisdictions. Yet, in California, Homestead and other insurers are now subject to suit for claims that have long since been extinguished by contract. This differential treatment should not be allowed to stand unexamined.

Upon such examination, it is apparent that Section 340.9 fails each of the three Contracts Clause elements articulated by this Court in *Energy Reserves Corp. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983): The statute substantially impairs—indeed it completely abrogates—contractual obligations; it does not serve a legitimate public purpose; and it is not reasonably tailored to such a purpose. *Cf. Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal. 4th 1142, 1146 n.1 (2001) ("there is a substantial dispute . . . whether [Section 340.9] is constitutional"). The court of appeals correctly concluded that Section 340.9 effects a substantial impairment, but erred in holding that impairment justified by the circumstances surrounding the Northridge earthquake. Pet.

12-18; *see Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] The court below relied exclusively on "the highly-regulated nature of the California insurance industry and the statutory underpinnings of the contractual limitations clause" in concluding that "§ 340.9's interference with contracts, while substantial, is not so severe as to render the statute unconstitutional." *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1098-99 (9th Cir. 2003). But Homestead is *not* licensed in or regulated by the State of California, and its contractual limitations provision is *not* required by any California statute. Thus, even if the statute can constitutionally be applied to admitted insurers employing statutory forms, it violates the Contracts Clause as applied to unregulated insurers such as Homestead.